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CLASSIFICATION OF CITIES: A PROBLEM IN STATUTORY CONSTRUCTION*

By Ralph D. Semerad

A recurring phenomenon in New York State is the statute which refers to first, second, or third class cities. Obviously, there is no such thing as a first, second, or third class city, in the absence of specific definition, and an examination of the laws of other states reflects a wide range of meanings for these terms.[1] The remarkable thing about the New York statutes is the fact that for over a quarter of a century there has been no written law of general application in this State which defines the classes mentioned. In fact, there has never been a statute with such a general effect. However, from 1894 to 1923 the State Constitution contained provisions setting up classes for limited purposes.[2]

This constitutional classification of cities seems to have been the result of a compromise effected by opposing forces in the home rule controversy which raged in New York during the 19th century. Municipalities had, from the time of the Dutch East India Company, been treated as administrative subdivisions of the state and were ruled by whatever agency was guiding the destinies of the state at large. After 1777, this agency was the state legislature. As the cities grew in size and number, the inefficiency, frustration and irrationality of government by remote control became more and more apparent. Popular discontent with the system led to the home rule movement, which sought to obtain for the cities a considerable measure of local autonomy and to eliminate the evils attendant upon gov-

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* This article is based upon a study made by the author, Professor of Law, Albany Law School, for the Law Revision Commission of the State of New York. See Leg. Doc. (1948) No. 65 (G).

1 For a complete list of such state congressional provisions and statutes see Appendix III of New York State Leg. Doc. (1948) No. 65 (G).

2 Article 12, section 2, Constitution of 1894, amended 1907.

ernment by special act. As early as 1846 the Constitutional Convention considered a home rule recommendation and rejected it. In 1878, the report of Governor Tilden's commission for the study of municipal reform gave an impetus to the movement which culminated in the home rule article of the Constitution of 1894.[3]

Article 12, section 2 of that constitution provided that all cities should be classified by population according to the latest state enumeration, as from time to time made. Cities of the first class included all those with a population of 250,000 or more; the second class, all cities having a population of 50,000 but less than 250,000; the third class, all other cities. The purpose of this classification was to provide a scheme whereby the legislature could legislate for municipalities by passing general laws and nevertheless meet the particular problems peculiar to each type of city. In effect, classification was a compromise between the evils of complete regulation of city affairs by the legislature through special laws, and the dangers inherent in attempting to embrace all communities, large or small, in one general scheme of regulation.

The 1894 standards of classification were in effect until 1907 when Article 12, section 2, was amended as follows: cities of the first class were to be those with a population of 175,000 or more; cities of the second class, all those with a population of 50,000 but less than 175,000; cities of the third class, all others. No mechanism was provided by the 1894 constitution or by the 1907 amendment for officially changing the classification of cities as their populations increased. However, the legislature, by statute, provided a method for fixing the time when a third class city became a second class city within the jurisdiction of the Second Class Cities Law.[4]

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3 For an interesting account of the progress and history of home rule in New York, see Lincoln, Constitutional History of New York, Vol. III, pp. 605-652.

4 L. 1925, Ch. 182, § 2, amended by L. 1905, Ch. 501, provided for the filing of a certificate of population by the secretary of state with each city clerk 30 days after a state enumeration. If any third class city had reached a population of 50,000, as indicated by this certificate, it became a second class city and the Second Class Cities Law applied to it. See also former section 4 of the Second Class Cities Law (L. 1906, Ch. 973, § 4).

In 1923, Aricle 12 section 2 was again amended. This time the provisions for the classification of cities were deleted and the section was confined to a statement that the legislature should not pass any special laws relating to the "property, affairs, or government of cities" but should act in relation to such matters only by general laws affecting all cities alike. This new version of section 2 was revised and renumbered by the constitutional convention of 1938 and now appears as Article 9, section 11, of the present state constitution, differing little from the 1923 amendment and, like it, failing to provide for any classification of cities.[5]

There is no other section of the constitution which mentions cities of the first, second, or third class, nor any section which defines such classes. Prior to December 31, 1923, there were no statutes defining these classes, for the simple reason that the constitution provided the necessary definition.

Since 1894, hundreds of statutes have been passed which were expressly restricted in operation to cities of designated classifications. Many of these have been amended, revised or repealed. However, a substantial number of them are still in effect and will continue to be for an indefinite time to come. An inspection of the general laws, consolidated and unconsolidated, reveals at least 65 references to "cities of the first class," forty-four references to "cities of the second class," and thirty references to "cities of the third class." These statutes have been

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5 Article 9, Section 11, of the New York Constitution, now reads:

"The legislature shall act in relation to the property, affairs or government of any city only by general laws which shall in terms and in effect apply alike to all cities, except upon the request of the mayor of the city affected concurred in by the local legislative body or upon the request of two-thirds of the elected members of the local legislative body declaring that a necessity exists and reciting the facts establishing such necessity and the concurrent action of two-thirds of the members of each house of the legislature. The legislature may by general laws confer on cities such powers of local legislation and administration in addition to the powers vested in cities by this article as it may, from time to time, deem expedient and may withdraw such powers. The provisions of this article shall not be deemed to restrict the power of the legislature to enact laws relating to matters other than the property, affairs or government of cities. (Formerly § 2 of Art. 12. Renumbered, transferred and amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)"

passed at various times subsequent to 1894, some of them prior to 1907, some prior to 1923, and others after 1923.[6]

The 1923 date is significant because the 1923 amendment to Article 12, section 2, and its 1938 counterpart, Article 9, section 11, eliminated the classification of cities from the New York State Constitution.[7] As of January 1, 1924, there ceased to be any generally defined classes of cities in state law.[8] However, it is incorrect to assume that statutory classification of cities ceased on that date. The significance of this distinction can best be explained by reference to the history and purpose of classification. Article 12 arbitrarily allocated the cities of this state among three classes, according to population. It then pro-

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6 See New York State Leg. Doc. (1948) No. 65 (G), appendices II A, B, C, for statutes and recent amendments.

7 The elimination was effected by omitting the classification provisions from the new Article. This represented a victory for the opponents of classification, who had stadfastly campaigned against this dilution of home rule. See "Revision of the State Constitution" (1915 Papers on Special Topics, pt. 2, pp. 3-4, 49). This is a collection of papers, addresses and discussions presented at the annual meeting of the Academy of Political Science in the City of New York on November 19 and 20, 1914. On Pages 3 and 4 of his article, "Home Rule for Cities," Howard L. McBain comments on the fact that clsasification of cities for legislative purposes merely continues the old evils of special legislation for the government of cities and that the formation of a special class for every law enacted appears to circumvent the scheme. In "Home Rule: A Proposal for a Revision of the Municipal Article of the Constitution," at page 49, Lawrence Arnold Tauzer affirms that division of cities into classes proved of no value and should be done away with since it merely provided a means of evading the prohibition against special legislation. The Record of the 1915 Constitutional Convention shows that several amendments were proposed which affected the classification provisions. Proposal No. 187 fixed the minimum population for first class cities at 200,000. Proposals Nos. 318, 335, 380, 583, 693, 698, 719, 823 left the first class minimum at 175,000. Proposal No. 796 suggested two classes of cities, those organized under charters and laws passed by the legislature, to be called "legislative cities," and all others, to be called "home rule cities." Proposals Nos. 568 and 671 made no classification at all.

8 The provisions of Article 8, Sec. 10, contain a very restricted form of classification with reference to real estate taxation. Article 2, § 4 of the Second Class Cities Law was amended by L. 1925, ch. 392 to provide that the law should apply only to cities which were second class cities on December 31, 1923. Article 1, § 2 of the Vehicle and Traffic Law, L. 1929, ch. 54, now provides that "City of the first class, city of the second class, city of the third class shall have respectively the meanings which they had on December 31, 1923." Article 7, § 107 of the Agriculture and Markets Law, L. 1929, ch. 173, states that "the words city of the first class, city of the second class, city of the third class mean cities having population, respectively, heretofore prescribed and as commonly understood according to the latest state enumeration as from time to time made." The latter three definitions are limited in effect to the particular law in which they are contained.

hibited the passing of special city laws except pursuant to an elaborate procedure.[9] General city laws, applicable to all cities in a class, were permitted, and appropriate classes were established. It must be especially noted that the provisions of the Article, including the classification portion, were specifically applicable to legislation relating to the "property, affairs or government of cities," a phrase which has been very narrowly construed by the courts.[10] The purpose of the classification was to permit the legislature to narrow the scope of statutes affecting the property, affairs, or government of cities without having such statutes declared unconstitutional as special laws.

The classes thus created were thereafter used as terms of fixed meaning in statutes which were neither general no special city laws, nor governed by Article 12.[11] The legislature was not required to classify in these statutes, but, if it chose to do so, it could set up any classes it wished. If it desired to classify cities in accordance with Article 12, it might do so. The reason for such borrowing is obvious; the classes were convenient and the terms had a readily ascertainable meaning, obviating the necessity for special definitions in each statute.

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9 This procedure required that any special city law, after passage by both branches of the Legislature, be transmitted to the city or cities affected for approval by the proper authority, usually the mayor or the mayor and city legislative body. Provision was made for public hearing concerning such bill. Upon acceptance by the city, the bill went to the Governor for action. If there was no acceptance, the legislature might again pass the bill, which would then be submitted directly to the Governor.

10 See 4th Report of Home Rule Commission, Leg. Doc. (1928) No. 55, p. 14, which states that "it is necessary to inquire whether a proposed subject of legislation is a matter of state concern or of local concern." In N. Y. Steam Corp. v. City of N. Y., 268 N. Y. 137, 197 N. E. 172 (1935), it was stated that matters of paramount state concern only, as distinguished from those of dominant local significance, were not subject to the requirements of Article 12, § 2. In County Securities, Inc. v. Seacord, 278 N. Y. 34, 15 N. E. (2d) 179 (1938), the Court says, "The words 'property, affairs or government' have a narrow significance. Not all laws which touch a city in its 'property, affairs or government' can be controlled by local laws." See also Adler v. Deegan, 251 N. Y. 467, 167 N. E. 705; Admiral Realty Co. v. N. Y. City, 206 N. Y. 110.

11 For example, see the references in L. 1909, Ch. 16, 25, 88; L. 1910, Ch. 640, 700; L. 1913, Ch. 256; L. 1937, Ch. 609; many other illustrations may be found in the statutes listed in New York State Leg. Doc. (1948) No. 65 (G), Appendix II A.

Article 9, section 11, of the present Constitution, and its predecessor, Article 12, section 2, as amended in 1923, require that the legislature shall act in relation to the property, affairs or government of any city only by general laws which shall apply alike to all cities. All references to classification are deleted. However, classification is still permissible in statutes not within the narrow purview of the new Article. There is a vast area in which the legislature may legislate and classify, despite the fact that cities are affected.[12] There are, in addition, many statutes, not directed at cities, which refer to classifications.[13] Article 9 does not prohibit them. Furthermore, classifications made in statutes passed under the prior home rule articles have been preserved by the saving clause in Article 9, section 13, until such time as those statutes are "repealed, amended, modified, or superseded".[14] The laws of New York now refer to classes of cities and future laws may continue to do so.

Basically, the problem is one of construction, not constitutionality. Assuming these statutes are to be constitutional, what do they mean when they refer to a "city of the first class", "city of the second class", or "city of the third class"? These words once had a meaning fixed by the Constitution. What do they mean now? Statutes using those terms have been passed since 1923, and other statutes containing them have been amended by recent legislatures.[15] What do the terms mean in such statutes? This question does not arise when an act establishes its own classes on the basis of population, as many current laws do.[16] However,

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12 Article 9, section 11, New York Constitution expressly states: "The provisions of this article shall not be deemed to restrict the power of the legislature to enact laws relating to matters other than the property, affairs or government of cities." See also note 10, *supra.*

13 See note 11, *supra.*

14 "The provisions of this article shall not affect any existing provisions of law not inconsistent with this article; but all existing charters and other laws, so far as not inconsistent with this article, shall continue in force until repealed, amended, modified or superseded in accordance with the provisions of this article." Article 9, section 13, subd. a.

15 See L. 1945, Ch. 159, 338, 788, 853; L. 1946, Ch. 7, 16, 27.

16 See Laws 1936, Ch. 31; Laws 1924, Ch. 50, § 1; Laws 1924, Ch. 574, § 1. There are many others with similar provisions.

use of the phrase "city of the first class", for instance, assumes that the phrase has an ascertainable meaning. Until January 1, 1924, it had such a meaning. The courts merely referred to the appropriate section of the constitution. Is this simple approach still available? No assistance in interpreting such a phrase is given by the constitution or any general statute. What principles of construction should apply?

An act generally speaks as of the time when it took effect.[17] In the case of the consolidated laws this principle is complicated by section 95 of the General Construction Law, which provides that "the provisions of a law repealing a prior law which are substantial reenactments of provisions of the prior law, shall be construed as a continuation of such provision of such prior law, modified or amended according to the language employed, and not as new enactments".[18] This formula compels construction of the superseding statutes in the light of the prior one, except as the former have clearly changed the latter.

Once a time is picked as of which the statute speaks, certain basic tenets of construction may be applied. The words used should be given their natural and obvious meaning in the light of circumstances.[19] Usage and custom may afford a practical construction if they are general at the time of enactment,[20] and such a construction, which has received the acquiescence of the public, the members of the bar, and the officers charged with its enforcement, will be given considerable weight.[21] These principles are of value in construing statutes passed since 1923.

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17 People v. Broadway R. Co. of Brooklyn, 126 N. Y. 29, 26 N. E. 961. See also Book 1 McKinney's Consolidated Laws of N. Y., "Statutes," § 93.

18 This section was derived from the old Statutory Construction Law, Laws 1892, Ch. 677, § 32, as amended Laws 1894, Ch. 448, § 1, and is merely declaratory of a well established principle of statutory construction. People v. Dooling, 141 App. Div. 31, 125 N. Y. Supp. 783; People v. Dwyer, 215 N. Y. 46; Op. Atty. Gen. (1913) 78, 33.

19 Newell v. People, 7 N. Y. 9.

20 People v. Walker, 17 N. Y. 502; McKinney's Consolidated Laws, Book 1, § 127.

21 Curtis v. Leavitt, 15 N. Y. 9.

As to prior statutes, it seems clear that they speak in the light of the then existing constitutional provision, in effect incorporating so much of the classification as may be necessary. This poses a further problem. The classification section was amended once and eventually repealed.[22] How did this affect those statutes enacted with reference to it? Did the classes named change and then vanish as the constitutional provision for them was altered and then deleted?

That would seem to be the result when a general law is incorporated into a special statute,[23] or when one section of an act is incorporated into another section of the same act by reference.[24] Such a construction hardly seems desirable in the present case, which is more nearly analogous to the situation wherein a complete and specific statute is incorporated into another statute. The applicable rule states that the specific statute, as it read at the time of incorporation, becomes part of the incorporating statute.[25]

The meaning thus established does not fluctuate in accordance with subsequent amendments to the incorporated act. Furthermore, the incorporating act is not affected by repeal of the act incorporated. The provisions of the latter act continue in force insofar as they form part of the incorporating act.[26]

By applying the foregoing principles to the problem at hand, it is comparatively easy to interpret the references to classes of cities occurring in statutes passed prior to January 1, 1924. Each such statute effectively incorporated the classification made by the constitution at the effective date of the law. Furthermore, since the statute spoke as of its date, the cities within said classes were determined as of that time, unless provision was made for opening the classes and admitting cities which

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22 Amended 1907 and repealed 1923.

23 Ontario Bank v. Bunnell, 10 Wend. 186.

24 Elegant v. Bookbinder, 173 Misc. 313, 18 N. Y. S. (2d) 173.

25 Carling v. Purcell, 3 Misc. 55, 22 N. Y. Supp. 558.

26 Wick v. Ft. Plain & R. S. R. Co., 27 App. Div. 577, 50 N. Y. Supp. 479; People ex rel. Thompson, v. Webster, 8 Misc. 133, 28 N. Y. Supp. 646.

were new or had come within this class since the statute went into effect. Few statutes have made such a provision,[27] although it could be read into some as a necessary implication. Subsequent changes in the constitutional classification did not alter these statutes. The repeal of the constitutional classification did not invalidate the classification made by the statute.[28]

From 1894 to 1907 a city of the first class was one containing 250,000 or more inhabitants; second class cities were those with 50,000 but fewer than 250,000 inhabitants; all others were third class cities.[29] Statutes passed during that period and referring to those classes naturally referred to cities then within the constitutionally defined population ranges. From 1908 to 1923, first class cities were those with a population of 175,000 or over, second class cities ranged from 50,000 to less than 175,000 and all others remained in the third class.[30] Statutes passed during this period must be interpreted in the light of the new classification.

The theory of construction outlined above is accepted in the few cases in which the Court of Appeals has been called upon to decide this point. In *Stack* v. *City of Brooklyn*,[31] the fixing of the class and the cities within it as of the time the statute was approved by the court. In *House* v. *Bodour*[32] the Court of Appeals affirmed a decision in which the lower courts had held that the Tenement House Law, adopted in 1901 and expressly

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27 Laws 1898, Ch. 182, § 2, as amended Laws 1905, Ch. 501. See note 4, *supra.*

28 See note 26, *supra.*

29 Article 12,, § 2, Constitution of 1894.

30 Article 12, § 2, amendment of 1907.

31 150 N. Y. 335, 44 N. E. 1030; *affg.* 9 Misc. 260, 29 N. Y. Supp. 743. An act of 1884 purported to apply to "cities of a population of 800,000 or more according to the last census." At the time, Brooklyn had fewer than 800,000 inhabitants. The census of 1890 showed the population of Brooklyn to be over 800,000. It was held that the statute did not apply to Brooklyn but only to cities within the class when the statute was passed.

32 281 N. Y. 749; *affg.* 168 Misc. 766, 7 N. Y. S. (2d) 443; 256 App. Div. 1037, 10 N. Y. S. (2d) 934. The Court took judicial notice of the population of Syracuse at the time the act became effective.

applying to "first class cities", applied only to cities which, by the classification of 1894, were first class cities in 1901. The new classification adopted in 1907 was deemed to be no part of this law, and cities which subsequently became populous enough to be first class cities, under either standard, were excluded from its operation. It is interesting to note that the Tenement House Law of 1901 was repealed and re-enacted in 1909, after the classification had changed. The court, following the principles already discussed, held that the re-enactment was merely a continuation of the prior statute and did not indicate any intent to make the new classification apply.

A few decisions have utilized the saving clauses of the old Article 12 and the present Article 9 to sustain the validity of statutes making classifications in matters affecting the property, affairs or government of a city, when such statutes were passed prior to 1924.[33] These cases have usually involved the Second Class Cities Law, which was amended in 1925 to provide its own definition of cities to which it was applicable.[34] The courts are in agreement that the repeal of the classification sections of the constitution did not automatically invalidate all statutes speaking in terms of those classes.[35]

Up to this point the problem of construction has been simplified by the presence of standards in the constitution. Since January 1, 1924, there have been no such express standards How is a statute passed since that date to be interpreted if it refers to cities by classes? The law reports are quite silent on this particular point. Presumably the tests of usage and custom must be applied inasmuch as the classes do not furnish their own definition. Each class will mean what it had come to mean through prior usage. Unfortunately, in the case of first and second class cities the terms have two possible meanings, depending upon whether usage prior to or subsequent to 1907

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33 Ponsrok v. Yonkers, 254 N. Y. 91, 171 N. E. 917 (1930); Application of Grenfell, 185 Misc. 558, 58 N. Y. S. (2d) 284 (1945); *aff.* 269 App. Div. 600, 58 N. Y. S. (2d) 501; *aff.* 294 N. Y. 610, 63 N. E. (2d) 593.

34 Second Class Cities Law, § 4, Laws 1925, Ch. 392.

35 See cases cited in notes 32 and 33, *supra.*

is adopted. This difficulty may be more apparent than real, for it does seem that the legislature would be adopting the most recent usage, that which obtained in 1923.

The few legislative manifestations available on that point tend to substantiate this theory of construction. The Vehicle and Traffic Law expressly refers to the 1923 meanings while the Agriculture and Markets Law vaguely hints at the same standard in its "definitions". The only other post 1923 attempt to define a class of cities, section 4 of the Second Class Cities Law, is intentionally drawn much too narrowly to serve as a guide for general construction. However, it, too, utilizes the 1923 standard.[36]

Assuming that a statute passed after 1923 adopts the boundaries established for the various classes by the 1923 usage, does such statute also freeze the cities of the state into their respective classes as of December 31, 1923? The Second Class Cities Law has expressly adopted this construction.[37] Another alternative is to adopt the definition prevailing in 1923 and to apply it, as of the effective date of the statute being construed, to the cities in the state according to the latest census or enumeration. Suppose, for instance, that a statute is passed in 1949, effecting "first class cities." The 1923 usage fixes a population of 175,000 or more as the requisite for first class cities. The enumeration of 1915 gave Syracuse a population of 145,293, which had grown to 171,717 at the time of the 1920 census, and 182,003 in the 1925 enumeration. The 1940 census gives Syracuse a population of 205,967. If usage freezes the class as of 1923, Syracuse is still a second class city. If usage merely fixes the limits of the class, leaving its composition to be determined as of the date of the statute, Syracuse would fall within the statute. The second theory would seem preferable, although it is by no

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36 For text of these statutes, see note 8, *supra.*

37 L. 1925, Ch. 392.

means certain that it is the proper interpretation of an unexpressed legislative intent.[38]

The illustration seems to suggest one other complication. Article 12 unmistakably based its classes upon "the latest state enumeration." Is this provision also incorporated, as usage, along with the population standards of Article 12? The Agriculture & Market Law definition unequivocally so provides, not entrusting this point to the "common understanding" which was to fix the limits of the classes.[39] This expression of legislative intent is ambivalent at best. Did the Legislature refer to the state enumeration in order to confirm the common understanding and usage or did it do so because usage would not ordinarily limit the definition in such a manner?

The Vehicle & Traffic Law definition may also be based upon the state enumeration. Such a construction seems obligatory when the statute states that "city of the first class, city of the second class, and city of the third class shall have respectively the meanings which they had on December 3, 1923."[40]

It is clear that when numerical population determines the limits of the classes there must be an authentic source from which the requisite statistics may be drawn. As long as state enumerations were provided for and taken, the intent of the Legislature to refer to its own statistics in connection with any mention of population might reasonably be inferred. When the Constitution or a statute incorporates such a reference, the intent is unequivocal. State enumerations were regularly made

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38 The search for legislative intent may be futile in these cases, since none is ordinarily expressed and several alternatives of equal plausibility will suggest themselves. For instance, does the legislature mean to make the statute applicable only to cities within the class at the time of passage; or does it intend to create an open-end class which will admit cities reaching the required population? In either case, is the statutory class open at the other end, releasing cities which have shrunken or grown out of the class?

39 L. 1929, ch. 173.

40 L. 1929, ch. 54.

under Article III, § 4, of the Constitution, in connection with the appointing of senators and assemblymen. However, the last enumeration was made in 1925. In 1931, Article III was amended to authorize use of the Federal census for apportionment. A state enumeration might be had in default of a Federal census, but the probability is a remote one.

In the light of these circumstances, the clues to legislative intent furnished by the Vehicle & Traffic Law and the Agriculture and Market Law become highly unreliable. The definitions included therein were adopted before 1931, at a time when the state enumeration was a part of New York law. Usage would require reference to it. It seems highly improbable that a Legislature, legislating for population groups in 1949, would be adopting census figures determined in 1915 or 1925. A more reasonable supposition is that it deals with current problems in the light of current statistics. This is recognized by § 37-b of the General Construction Law, which defines the term "population" in the light of the latest Federal or State census or enumeration.[41]

Numerous other statutes make specific classifications, according to population, by reference to "the last federal or state census or enumeration."[42] There is manifested no legislative hostility toward the use of current federal census figures, nor any legislative intent to ignore the fact that the state's population has grown since 1915 and 1925.

A trend is discernible toward the fixing of specific population standards for individual statutes in lieu of reference to the estab-

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41 § 37-b—General Construction Law. "Population—The term population when used in relation to this state, or a municipality or other subdivision thereof, or a portion of such a municipality or subdivision, shall, unless otherwise provided in relation to such use, mean population as shown by the latest federal or state census or enumeration preceding the time as of which such population is to be determined. (L. 1935, c. 65. Eff. Mar. 1, 1935.)

42 See Laws 1936, Ch. 31; Laws 1924, Ch. 50, § 1; Laws 1924, Ch. 574, § 1. There are many others with similar provisions.

lished classes.[43] Nevertheless, the old classifications are often mentioned, and, until they are discarded entirely, must be capable of definition. There seems to have been a minimum of litigation requiring construction of reference to classes of cities. Prior to 1924, the problem of construction was not acute because of the constitutional definition. Since 1923, room for dispute exists because of the deletion of the applicable constitutional provisions. The fact that the words in question once had a meaning defined in the Constitution and were commonly used has encouraged their continued use, creating, at the same time, false confidence in their certainty. It may be conceded that lack of a statutory definition has created no serious difficulty to date. Actually, the continued existence of this void may be attributed to the fact that statutes referring to classes of cities are not a very prolific source of litigation. The need for definition has not been felt. This hardly constitutes sufficient reason for inviting confusion in the future. The words have no meaning in themselves. The meaning customarily attributed to them was provided for by express enactment. This enactment has been repealed, but the words continue to be used. It does seem that a gap exists which should be filled. The Legislature has recognized that fact in three specific instances and might well do so generally.[44]

A statutory definition, if adopted, should represent an attempt to express the common understanding of references to classes. It would necessarily adopt the population standards established by the 1907 amendment to Article 12, and would follow current legislative policy in referring to the latest federal or state census or enumeration. Provision should be made for saving and pre-

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43 The General City Law, § 141, was amended by Laws 1928, Ch. 285, changing the words "city of the first class" to "city having a population of more than 300,000 inhabitants." Section 10 of the same law dropped its reference to cities of the first class when amended by Laws 1923, Ch. 393. Section 12 of this law deleted a reference to "cities of the third class" when amended by Laws 1929, Ch. 346. The Laws of 1944, Ch. 154, amended section 13-b of the General City Law, changing "third class city" to "city of less than 50,000 inhabitants." Section 879 of the Education Law now refers to cities within certain population ranges, whereas it formerly referred to cities of the first and second class.

44 Agriculture and Markets Law, § 107; Second Class Cities Law, § 4; Vehicle and Traffic Law, § 2, subd. 17.

serving any conflicting definitions made in specific statutes, present or future. The operation of the statute should be made prospective in order to avoid amendment of existing statutes and the attendant complications. Undoubtedly, the new definition would be used as a guide by the courts in the interpretation of statutes passed between December 31, 1923 and its effective date. This seems both desirable and permissible. The new statute would then serve the dual purpose of dispelling past confusion and creating future certainty.[45]

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45 The Law Revision Commission of the State of New York has recommended such a statute. See Leg. Doc. (1948) No. 65 (G). It reads: "The terms first class city and city of the first class mean a city with a population of one hundred seventy-five thousand or more; the terms second class city and city of the second class mean a city with a population of fifty thousand and less than one hundred seventy-five thousand; the terms third class city and city of the third class mean any city not included in the foregoing classes. The classification herein made shall be determined by the federal census or state enumeration, whichever is the later, as last previously taken before the effective date of such statute. This section shall not be interpreted to change the classification of any city under laws effective on or prior to September first, nineteen hundred forty-eight.

FURTHER CONSIDERATION OF A PRIVILEGE FOR NEWSMEN[1]

By Earl H. Gallup, Jr.

The most recent version of a proposed amendment of the Civil Practice Act to extend to newsmen privileges from divulging the sources of their information was defeated in the New York Senate on March 8, 1949. Similar bills had been proposed to the legislature in various forms since 1930. The first of these[2] provided that a proprietor or editor of a news publication should *not be allowed* to disclose the source of information communicated to him in confidence. The latest proposal was drafted by the Law Revision Commission[3] for adoption if the legislature should decide in favor of granting a privilege to newsmen. Under this draft, no reporter would *be compelled,* in any action or proceeding, to disclose the source of any information procured by him while he was a reporter, except when, after application by the person seeking the information, the supreme court should find that disclosure is essential to the protection of the public interest.

The justification of the existing privileges extended to the doctor, lawyer, clergyman and spouse[4] has been the belief that the public good is better served by encouraging the confidential

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1 Senator Thomas C. Desmond, in his article, "The Newsmen's Privilege Bill," 13 Albany Law Review, No. 2, p. 1, has discussed the question of newsmen's privilege in some detail. The present article is intended merely to extend and develop some of the points suggested in the course of that discussion. No attempt is made to review all the arguments which have been advanced for and against the privilege.

2 Senate Int. No. 138, Pr. 139 (1949).

3 Law Revision Commission Report, Leg. Doc. (1949) No. 65(A).

4 C. P. A. §§ 349, 351, 352, 353.

relationship rather than by uncovering the facts.[5] The principal question presented by a bill extending such a privilege to newsmen is whether the public good is better served by fostering a confidential relationship between reporters and their informants, or by compelling the reporter to disclose his source when called upon to do so by a properly constituted judicial, quasi-judicial or legislative body.

Because of the similarity of purpose which is felt to be requisite to the establishment of a proper justification for an extension of privileges to newsmen, the proponents and advocates of the privilege have attempted to draw an analogy to the privileges already extended in certain professional fields. This cannot be done accurately for several reasons: (1) Under the traditional privileges, it is the information which is privileged and not its source. Where the subject matter of the communication is known to a third person not standing in the same relation, it is no longer considered as confidential and is not privileged.[6] On the other hand, the proposed privilege would give the right to disseminate the information but keep the source confidential. The disclosure of the information in the first instance to the reporter is with the intention that it should be disseminated. (2) A physician, attorney, clergyman or spouse is *not allowed* to disclose a confidential communication under the existing statutes.[7] The privilege accorded to these classes is actually the privilege of the patient, client, penitent and other spouse.[8] If a privilege were extended to newsmen under the proposed bill, the reporter could not be *compelled* to disclose the source of his information, leaving it entirely to his own discretion to expose or shield his confidant as he may see fit. The question immediately arises as to whether the privilege is actually for the protection of the reporter or the informant. Such a privilege, personal to the reporter, could certainly not be justified as better serving the general public good when he would be allowed to

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5 Steinberg v. New York Life Ins. Co., 263 N. Y. 45, 188 N. E. 152.

6 Matter of Krup, 173 Misc. 578, 18 N. Y. Supp. (2d) 427 (1940).

7 See note 4, *supra.*

8 Matter of Fisher, 51 F. (2d) 424 (1931).

disclose his source for his own benefit. Under the proposed bill, the reporter defendant would still be permitted to disclose the source of his information, whether or not communicated to him in confidence, in mitigating damages in an action for libel or slander.[9] This provision alone is a hint that the privilege would actually belong to the reporter and not his informant. (3) There are certain sanctions applicable to those classes to whom existing privileges apply which tend to restrict abuses of those privileges to a minimum. Physicians and lawyers are licensed by the state, and their professional activities are carefully scrutinized by various organizations of their own members. Certainly in the case of clergymen and priests such scrutiny is not warranted or necessary. On the other hand, the nebulous activities of some newsmen are only restricted by limit of their own zeal, or that of their employers. The protection of innocent persons from slander and libel by the unscrupulous newsmen seems more compelling in the public interest than the protection of equally unscrupulous informants.

One of the principal arguments of the proponents of a newsmens' privilege is that it is necessary for the preservation of a free press. These persons argue that newsmen, in order to perform their public function of exposing waste and corruption, must be entitled to withhold their sources in order to insure their availability. It is conceded that such a function is desirable from a civic viewpoint in some instances. However, it would seem likely that the privilege may have the result of obstructing the effective service of the same public interest which its creation would purport to protect by hampering the inquiries which the newsman himself provoked. It is true that under the proposed bill the supreme court can divest the newsman of his privilege, but only when the court shall find that disclosure is *essential* to the protection of the public interest. Should such a burden be cast upon the courts when the various legislatures have been unable to resolve that same conflict?

It is to be noted that under the proposed draft, publication of the information is not a necessary prerequisite to the asser-

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9 C. P. A., § 338.

tion of the privilege by the reporter.[10] The wording of the draft is merely to the effect that no reporter shall be compelled to disclose the source of *any* information procured by him from another person. This language would presumably cover even information conveyed to him by another reporter, as well as information which was never intended for public dissemination by either informant or reporter. It could not be contended that disclosure of such information was essential to the protection of the public interest, hence, even the courts would be powerless to compel disclosure of the source.[11] Even the advocates of the bill certainly never intended that such possible abuses should be within the protection of the privilege. Neither can a privilege to withhold information under such circumstances be justified in the public interest, for it could not be argued that in fostering such a relationship the public good was better served than by compelling disclosure of the facts. If the information procured by the reporter was never intended for publication, it necessarily follows that neither the reporter in receiving it, nor his informant in disclosing it had imagined that the reporter was exercising his supposed function of keeping the public enlightened, and therefore the reason for privilege would not be present.

Many quarters have questioned the need for a newsmen's privilege. Since 1896, eleven states have adopted statutes extending some sort of privilege to newsmen,[12] some qualified, some extensive. Thirteen states, on the other hand, have rejected similar statutes.[13] The scope of these bills and statutes has been considerably varied; some have been limited to newspapermen, some to matter of public interest, some to civil proceedings, and some requiring that the information must have been published.

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10 See proposed draft of Law Revision Commission, note 3, *supra.*

11 Ibid.

12 Alabama, Arizona, Arkansas, California, Indiana, Kentucky, Maryland, Montana, Ohio, Pennsylvania, and New Jersey.

13 Connecticut, Illinois, Massachusetts, Michigan, Missouri, New Hampshire, New York, Oklahoma, Rhode Island, Texas, Virginia, Washington, and Wisconsin.

Apparently, only those eleven states which have adopted a privilege have deemed it necessary. In this state, the urgency of the problem has been brought to light by reported cases on only three occasions. The first case to pass on the question of a newsmen's privilege arose in 1873,[14] involving the committal of the city editor of a New York City newspaper for refusal to testify before a grand jury. The contemner had refused to reveal the author of an allegedly libelous article which appeared in his paper, on the ground that the regulations of his employer prohibited such disclosure on the principle that the paper alone was responsible. In affirming the commitment, the court said:

> "As the law now is, and has for ages existed, no court would possibly hold that a witness could legally refuse to give the name of the author of an alleged libel, for the reason that the rules of a public journal forbade it."[15]

The question of a newsmen's privilege was not raised again in the courts of this state until 1935. A reporter on the *New York American* was called as a witness before a grand jury investigating gambling in the county of New York. This witness had written a series of articles concerning the "policy market" in New York, relating his experiences among the alleged gamblers during a recent period. When called upon to reveal the names of these persons, he refused, asserting that a newspaperman is only valuable in his profession as long as he keeps his sources confidential. The reluctant reporter was cited for contempt, and upon appeal his fine and commitment were affirmed by the Court of Appeals.[16]

In February, 1948, the third such incident, very similar in its facts, occurred in Newburgh. Two reporters on a local paper had written an article concerning gambling and vice in that

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14 Peo. ex rel Phelps v. Fancher, 9 Supreme Court (2 Hun.) 226 (1874).

15 Ibid, p. 230.

16 Peo. ex rel Mooney v. Sheriff, 269 N. Y. 291, 199 N. E. 415 (1936). The court said in its opinion: "The policy of the law is to require the disclosure of all information by witnesses in order that justice may prevail. . . . The tendency is not to extend the classes to whom the privilege from disclosure is granted, but to restrict that privilege."

city, and in conjunction with the article had printed reproductions of lottery tickets allegedly obtained there. When requested before the grand jury to disclose where they had obtained the tickets, they refused, claiming that the code of ethics of their profession forbade such a disclosure. The judgment fining and committing them for contempt was vacated on the ground that they had not been given due opportunity to defend the charge of an alleged contempt not committed in the presence of the court.[17]

From the paucity of cases in which newsmen have been compelled to disclose the sources of their information, it would seem that extension of a privilege is not necessary. Of course, it does not follow that these are the only instances in which a privilege has been asserted in the past; however, it appears that even in these three extreme cases, the refusal to disclose the particular information sought was not justified. If the purpose of the privilege is to foster a confidential relationship between reporters and criminals, certainly it cannot be justified on any basis, legal, moral or sociological. The searching out of criminals is more essential in the public interest than the adherence to the codes of ethics of various occupational groups.

Public approval and the necessities of orderly life in the community have created the privileges as they exist today. The interest of the community in its search for the truth should not be subordinated to the personal attitude of a relatively small professional class. Perhaps this attitude was more vividly epitomized by Phillipps in his treatise on evidence more than one hundred years ago.[18]

> "The expediency of this rule (of privilege) must depend not on the impropriety of violating the confidence reposed, but on a consideration that the collateral inconvenience, which would ensue if no such confidence were reposed, would preponderate over the direct mischief produced by a chance of the failure of justice resulting from the exclusion of evidence."

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17 Peo. ex rel Clarke v. Truesdell, 79 N. Y. Supp. 2d 413 (1948).

18 Phillipps on Evidence, 134; see 8 Wigmore on Evidence 831, § 2285.

LEGISLATION

Introduction. In the years since the war this section has been devoted to important legislative changes enacted during and subsequent to the war period. Considering that the need for coverage of this period has now elapsed, the editors, commencing with this issue, have devoted the section to current legislative changes which it is felt will be of general interest. The survey is necessarily selective and of limited scope.

CIVIL PRACTICE ACT

Sections 27, 28 Amended[1]*—Limitations, Enemy aliens*

Upon recommendation of the Law Revision Commission,[2] these sections were amended to provide that the statute of limitations will be suspended where a party is disabled to sue by reason of enemy alienage whether or not the cause of action arose prior to the period of such disability. Former Section 27 made no reference as to when the cause of action was to arise in order to give the disabled party the benefit of the suspension, but it was limited by former Section 28, which in referring to all disabilities, required that the disability exist when the right accrues. In *Nathan* v. *Equitable Trust Co.*,[3] the Court of Appeals interpreted former Section 27 in the light of Section 28 and held that the statute was not suspended upon causes of

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1 L. 1949, c. 326

2 "Since a non-resident alien enemy cannot sue in the courts of this state while a state of war continues, an action accruing to him before the commencement of the war may be barred by the statute of limitations before the war is terminated. The commission believes that the period during which the war continues should not be a part of the time for the commencement of an action by a person disabled to sue by reason of enemy alienage whether the cause of action accrues during or prior to the period of such disability." Leg. Doc. (1949), No. 65 (L), p. 9.

3 250 N. Y. 250, 165 N. E. 282 (1929).

action which accrued prior to the commencement of a war. The rule in the *Nathan Case* has therefore been overcome. A conformative change was made in Section 28 by adding the words, *except as provided in section twenty-seven.*

The amendment to Section 28 also inserts a new paragraph, the effect of which is to revive causes of action previously barred by former Sections 27 and 28, except where property rights had vested as a result of the operation of the statute of limitations. A question was raised as to the constitutionality of reviving barred claims as being in violation of the Fourteenth Amendment, but the United States Supreme Court held as early as 1885[4] that a state statute extending the time within which an action may be begun does not violate the federal constitution except where a prescriptive title to property has been obtained. The New York courts have not fully passed on the question but it was said on one occasion[5] that legislative action having that effect will be sustained if there is sound reason for giving litigants additional time in which to sue.[6]

Sections 194, 212 Amended; Sections 209, 211, 213, 216 Repealed[7]*—Joinder of parties and causes of action*

This series of changes, relating to permissive joinder of parties, has not materially changed the law but has served mainly to modernize the structure and language of the joinder sections by omitting outdated provisions and consolidating the remainder in one new statute.[8]

The heading of Section 194 (Joinder of Parties in interest) has been amended to read "Necessary Joinder of Parties" to am-

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4 Campbell v. Holt, 115 U. S. 620 (1885); decision followed in Chase Securities Corp. v. Donaldson, 325 U. S. 304 (1944).

5 Robinson v. Robins Dry Dock Co., 238 N. Y. 271, 144 N. E. 579 (1924).

6 See generally, Leg. Doc. (1949) No. 65 (L); see also Gallewski v Hents & Co., 195 Misc. 507 (1949), in which the court briefly discussed the change and held that Section 28, even as amended, does not apply to situations covered by Section 24 where a cause of action is stayed by reason of a statutory prohibition.

7 L. 1949, c. 147.

8 For detailed study, see Fifteenth Annual Report of The Judicial Council, pp. 56 and 58, and Supporting Study (B) pp. 209-228 (1949).

plify the distinction of its content from the provisions regarding permissive joinder in Section 212. Sections 209, 211 and 212 are merged into the new Section 212, and Sections 213 and 216 are repealed because they authorize joinders that are also covered in former Sections 209, 211 and 212, as well as the amended Section 212.

Former Section 211 on its face authorized unrestricted joinder of defendants. Former Section 209 provided that parties could join as plaintiffs if (1) there were a common question of law or fact, and (2) if a right to relief is alleged in respect to or arising out of the same transaction or series of transactions. This distinction between the two sections as to the requirements for joinder was questioned in *Great Northern Telegraph Co.* v. *Yokahama Specie Bank*[9] and there held that the joinder of defendants under Section 211 was subject to the two tests of Section 209 for joinder of plaintiffs. The decision has been embodied in new Section 212 by treating joinder of plaintiffs in subdivision 1 and joinder of defendants in subdivision 2.

Former Section 212, providing that each defendant need not be interested in defending as to all the relief demanded, has been embodied in subdivision 3 of Section 212, and expanded to embrace the proposition that each plaintiff need not be interested in obtaining all the relief sought. Subdivision 3 adds a new provision authorizing the court to order separate trials in case of joinder of defendants as was formerly provided in Section 209 for joinder of plaintiffs. The language has been broadened by providing that the right to relief asserted by or against parties joined shall arise out of the same transaction, occurrence or series of transactions or occurrences, whereas former Section 209 speaks only of the same transaction or series of transactions.

As amended, Section 212 is analogous to the permissive joinder procedure in Federal Practice.[10]

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9 297 N. Y. 135, 76 N. E. 2d 117 (1947).

10 Federal Rules of Civil Procedure, Rule 20.

Section 227-a Added[11]*—Attorney as agent to receive service of process on non-resident*

By this new section, the non-resident plaintiff who commences an action in this state against a resident of this state, constructively appoints his attorney as his agent to receive service of process as to any claim or cause of action that the defendant might have interposed as a counterclaim had the plaintiff sued in the Supreme Court.

This changes the earlier New York view[12] that a nonresident plaintiff who has invoked the judicial power of the state in his favor should not, by that fact alone, be subjected to its jurisdiction when the defendant seeks to sue him. On this theory, the New York courts were in the minority.[13] The previous difficulty lay in the fact that in some courts of inferior jurisdiction, the New York defendant might not be able to prosecute his claim against the non-resident plaintiff by way of counterclaim. His only recourse then would be by an original action, and if he were unable to get personal service on the non-resident he would be denied his suit unless he went to the state of the non-resident.[14] It thus seems that the effect of the statute would mostly be felt in courts of inferior jurisdiction, due to the availability of a counterclaim for any cause of action in the Supreme Court.[15] Similar statutes have been enacted in Massachusetts and California and held to be constitutional by the United States Supreme Court.[16]

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11 L. 1949, c. 161.

12 Petrova v. Roberts, 216 A. D. 814, 216 N. Y. Supp. 880 (1926) Roberts v. Thompson, 149 A. D. 437, 134 N. Y. Supp. 363 (1912).

13 Restatement, Conflict of Laws, Section 83.

14 See Leg. Doc. (1949), No. 65 (B).

15 C. P. A. §64, 67.

16 Frank L. Young Co. v. McNeal Edwards Co., 283 U. S. 398 (1931); Adam v. Saenger et al, 303 U. S. 59 (1938). In the Adam case, Justice Stone said (at p. 67): "The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence. It is the price which the state may exact as the condition of opening its courts to the plaintiff."

The legislature has expressly provided in this section that it shall not apply to service upon a foreign corporation which has obtained a certificate of authority to do business in this state or an association which has complied with Section 18[17] of the General Association Law. Proof of service is to be filed within thirty days, such service becoming complete ten days after filing; and the court may order such extension as may be necessary to afford the defendant a reasonable opportunity to defend.

Section 235 Amended[18]*—Service of process without state without order*

Following the sweeping changes[19] made by the 1946 legislature regarding the scope of making personal service without the state without an order,[20] a further change has been added this year to enable a plaintiff to obtain a valid *in personam* jurisdiction over a New York domiciliary, by this method of service, for any cause of action.[21]

Before the 1949 amendment, the section provided for personal service without the state without an order only only in cases where the defendant was a resident of the state, in an action for a sum of money only, and in any case specified

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17 Requiring every association doing business within the state to file a certificate designating the secretary of state as agent to receive service of process.

18 L. 1949, c. 185

19 L. 1946, c. 144.

20 13 Albany Law Review, No. 2, p. 63 (June, 1949).

21 Section 235 now reads: "A defendant in any case specified in section two hundred thirty-two, or a defendant domiciled in the state, may be served with the summons without an order, without the state in the same manner as if such service were made within the state, except that a copy of the verified complaint must be annexed to and served with the summons, and that such service must be made by a person or officer authorized under section two hundred thirty-three to make service without the state in lieu of publication."

in Section 232.[22] As it thus stood the serious question arose as to the validity of the service in a case where the plaintiff sues for a divorce and also asks a money judgment in the form of alimony or counsel fees.[23] It was contended that the money judgment so sought was not within the statutory province of a "sum of money only," and that consequently the court did not obtain an *in personam* jurisdiction. It was held, however, that the 1946 amendment gave the court both *in rem* and *in personam* jurisdiction when the defendant is a bona fide resident of New York and is personally served without the state. This enabled the court to grant the ancillary money judgments demanded in the cases posed.[24] Although the court reached the desirable result of settling both the matrimonial and alimony claims in the same action, the legislature evidently felt that there was some doubt as to their future adherence to this decision. The amendment removed this doubt by deleting the residence and sum of money requirements of a defendant to be served outside the state, retaining the provision for such service in any case specified in Section 232, and adding the new category of a defendant domiciled in the state. As amended, the statute more nearly approaches the holding in *Milliken* v. *Meyer*.[25] "Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service."[26]

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22 Service by publication may be had in the following actions: (1) Where the complaint demands judgment annulling a marriage, or for a divorce, or a separation; (2) Where the complaint demands judgment that the defendant be excluded from a vested or contingent interest in or lien upon specific real or personal property within the state; or that such an interest or lien in favor of either party be enforced, regulated, defined or limited; or otherwise affecting the title to such property; (3) Whether a levy upon property of the defendant within the state has been made under a warrant of attachment granted in an action to recover a sum of money only.

23 Similar problems were imagined under the prior statute: as where plaintiff was suing for an accounting; or for a deficiency judgment in an action to foreclose a mortgage; or to enjoin the defendant from prosecuting a matrimonial suit in a foreign jurisdiction.

24 Ellsworth v. Ellsworth, 189 Misc. 776, 71 N. Y. S. 2d 522 (1947); Feldman v. Feldman, 189 Misc. 564, 72 N. Y. S. 2d 390 (1947).

25 311 U. S. 457 (1940).

26 See generally, Fifteenth Annual Report of The Judicial Council, pp. 60-63.

Sections 457-a 459, 495 Amended; Section 461 Repealed[27]*— Judgment notwithstanding verdict: when permitted; appeal*

These changes, relating to motions for direction of a verdict and for judgment notwithstanding the verdict, were made primarily to eliminate the waste of time and money caused by unnecessary new trials.[28]

Subdivision 1 of Section 457-a now provides that the court may direct a verdict when it would be required to set aside a contrary verdict for legal insufficiency of evidence. Under the prior statute,[29] the question was raised whether a trial judge could direct a verdict simply because he would have set aside a contrary verdict *as against the weight of evidence,* without depriving a party of his right to a jury trial.[30] On two occasions[31] the court of appeals held that a verdict could be directed only where there was legal insufficiency of evidence. The amendment has codified this holding.

No changes were made in subdivision 2, but subdivision 3 has been rewritten to make the following modifications: *First,* the court is now given the power to dismiss a complaint or counterclaim on the merits notwithstanding the verdict or discharge of the jury without a verdict. This is in line with the court's right to direct a verdict for one party although a verdict has been returned for the other. *Second,* the court is given the power to deny as well as to reserve decision on a motion for a directed verdict or for the dismissal of a complaint or counterclaim;[32] to submit the action to the jury; and, thereafter, to

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27 L. 1949, c. 604.

28 For detailed study, see Fifteenth Annual Report of The Judicial Council, pp. 66-69, and Supporting Study (D).

29 The judge may direct a verdict when he would set aside a contrary verdict as against the weight of the evidence.

30 Art. I, §2, New York Constitution.

31 Bank of United States v. Manheim, 264 N. Y. 45, 189 N. E. 776 (1934); Blum v. Fresh Grown Preserve Corp., 292 N. Y. 241, 54 N. E. 2d 809 (1944).

32 Permitting a party to offer his evidence following the denial of his motion for a directed verdict at the close of his opponent's evidence without having reserved such right.

direct entry of judgment notwithstanding the verdict or notwithstanding the disagreement and discharge of the jury without a verdict having been rendered. This eliminated the prior fiction that a trial court is *deemed* to submit the action to the jury subject to the court's determination of the legal questions involved. *Third,* the court may not direct the entry of a judgment notwithstanding the verdict on its own motion unless it previously reserved decision on a motion for a directed verdict or dismissal of the complaint or counterclaim. *Fourth,* the time for making a motion for judgment notwithstanding the verdict was changed from the ten-day period after the reception of a verdict to the time provided in Section 549 for motions for a new trial.[33] A motion for judgment notwithstanding the verdict may be joined with a motion for a new trial. *Fifth,* an appeal may now be taken from an order denying a motion for judgment notwithstanding the discharge of a jury after it has disagreed and failed to return a verdict. This changes the rule as laid down in *Kramer* v. *United States Fidelity and Guaranty Company.*[34]

The trial court now having broader powers under the section as amended, deletions were felt to be necessary in Sections 459, 461 and 495. The provision in Section 459 permitting a trial court to reserve decision on motions to nonsuit the plaintiff or direct a verdict pending the jury's returning a special verdict, has been omitted. Section 461 pertaining to direction of a verdict subject to the opinion of the court has been repealed, as has an ancillary reference to Section 461 in the last sentence of Section 495.

Section 13 Amended[35]*—Limitations on cause of action arising in enemy country*

After the 1948 amendment,[36] this section provided that if a cause of action accrued in a country with which the United States

33 At the same term of court.

34 212 A. D. 644, 209 N. Y. Supp. 419 (1925).

35 L. 1949, c. 855.

36 L. 1948, c. 834.

or any of its allies was then or subsequently at war, the period of war was not part of the time limitation for the commencement of the action. The 1949 amendment has added that the section applies whether the action accrued in favor of a resident or non-resident, and thus has codified the ruling in a case pending at that time.[37] A further clarification is made by substituting the period of "hostilities" for the period of "war".[38]

Section 41-a Added[39]*—Adverse possession by tenants in common*

By this new section the occupancy of one tenant in common is deemed the possession of the other tenants in common until the expiration of a period of fifteen years of continuous occupancy, even when the tenant occupying the premises has acquired another title or is claiming to hold adversely to the other. Section 41-a has borrowed both the law and the language from Section 41 which construes adverse possession as between landlord and tenant.[40]

Section 51-a Amended[41]*—Adverse claims to moneys due under contract*

Prior to the amendment, this section permitted a defendant who was being sued on contract for more than fifty dollars, and who was subject to another claim therefor by a third person, to obtain an order notifying the third party to commence an action or intervene in the pending action within a year and ten days. This form of interpleader was held, however, not to be available where the plaintiff and the third party were each claiming as

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37 Bernstein v. N. Y. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij. 173 F. 2d 71 (1949).

38 See New York Leg. Doc. (1949), No. 65 (L).

39 L. 1949, c. 184.

40 See New York Leg. Doc. (1949), No. 65 (J).

41 L. 1949, c. 850.

agent of the same person.[42] This holding has been overcome in repealing subdivision 4 and enacting new subdivisions 4 and 5.

Sections 174-a, b, c Added[43]*—Tender before suit*

These new sections have codified the common law procedure whereby a party defending against a contractural claim may avail himself of a tender made before action commenced of a sum of money sufficient to satisfy the claim.[44] Section 174-a embraces this proposition by providing that such tender may be alleged in the answer as a defense. If so alleged, the tender must be paid into court before service of the answer. The payment of the tender into court must also be alleged. It is also provided that "tender and payment into court shall not be deemed an admission of the cause of action in respect to which the tender is made unless the cause of action be otherwise admitted."[45] Section 174-b provides that within ten days after the service of the answer the plaintiff may withdraw the amount deposited in satisfaction of the cause of action. Unlike the common law[46] the amount deposited, other than such sum as shall be applied to any judgment for the plaintiff, shall be repaid to the defendant at the termination of the action where there has been no withdrawal. It is also provided that if it be determined that the tender was made as alleged and was sufficient to satisfy the obligation, the plaintiff shall not recover interest from the date of tender, nor costs of the action, but shall pay costs to the defendant.[47] Section 174-c makes

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42 Amstelbank, N. V. v. Guaranty Trust Co. of N. Y., 177 Misc. 548, 31 N. Y. S. 2d 194 (1941).

43 L. 1949, c. 298.

44 The recommendation that CPA Sections 171-174 relating to tender after suit be repealed was not enacted. For the Council's entire recommendations, see Fifteenth Annual Report of The Judicial Council, pp. 53-56 and Supporting Study (A) (1949).

45 This changes the common law rule as expressed in Mann v. Sprout, 185 N. Y. 109, 77 N. E. 1018 (1906); Wilson v. Doran, 110 N. Y. 101, 17 N. E. 688 (1888); Stadler & Stadler v. Long, 137 Misc. 512, 241 N. Y. Supp. 637 (1930).

46 See Note 45 *supra.*

47 This codifies the common law rule as expressed in Tuthill v. Morris, 81 N. Y. 94 (1880); Nelson v. Loder, 132 N. Y. 288, 30 N. E. 369 (1892).

the procedure applicable to counterclaims; and parallel Rule 29 of the Rules of Civil Practice permits payment into court without an order if the payment is accompanied by the proposed pleading.

Section 302, Amended[48]*—Depositions*

This section now provides that the person examined must *read,* or have read to him, his deposition, and must subscribe it. Formerly no provision was made for the witness himself reading his deposition prior to subscription. These requirements may be waived by the court, which also has the power to assess damages or strike out a defense where there is a refusal to subscribe. A corresponding change was made in Rule 129 of the Rules of Civil Practice.[49]

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48 L. 1949, c. 448.

49 See Fifteenth Annual Report of The Judicial Council, p. 63; and Supporting Study (C) (1949).

DECEDENT ESTATE LAW

Section 180 amended[1]*—Limitations upon recovery where injury causes death*

The damages recoverable in an action for personal injuries prosecuted under the survival statute[2] have been enlarged to embrace funeral expenses paid by the estate or for which the estate is responsible. Otherwise, the prior limitations, confining damages to those accruing before death, remains in force.[3]

Sec. 132 amended[4]*—Amount of recovery*

The reasonable medical expenses, incident to the injury, and reasonable funeral expenses may not be included in the damages awarded for wrongful death if they were paid by the deceased's spouse or next of kin or if such person is responsible for their payment. The section as previously amended permitted recovery of funeral expenses, and of medical expenses, "paid by the decedent or by a person entitled to the whole or a distributive share of the moneys recovered or for the payment of which such decedent or person is personally responsible."[5] The sum awarded is no longer distributed as unbequeathed assets of the estate but is divided among the spouse and next of kin according to the pecuniary injury each sustained.[6] On principle, the beneficiaries of the judgment should be reimbursed for such expenses only when required to pay them. Where they are not so required,

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1 L. 1949, c. 638, § 1.

2 D. E. L., § 119.

3 The change was recommended by the Law Revision Commission in conjunction with the amendments to sections 132 and 133 of the Decedent Estate Law and to section 189 of the Lien Law. See Leg. Doc. (1949) No. 65 (C).

4 L. 1949, c. 638, § 2.

5 L. 1935, c. 224.

6 D. E. L., § 133.

these expenses are debts of the estate and recoverable by the estate in the action under the survival statute as amended.[7] The intention is to prevent a possible double recovery under the wrongful death act and the survival statute.[8]

Sec. 132 amended[9]—Distribution of proceeds

The proceeds of an action for wrongful death are to be distributed, under this section as amended, to the surviving spouse or next of kin, or both, in proportion to the pecuniary injuries suffered. Subject to important qualifications appearing in section 133,[10] the previous basis of division was the Statute of Distribution.[11] This change is designed to correct a rule "manifestly illogical and unjust."[12] It forestalls the possibility of an adult son taking twice as much of the award as his mother, though she be destitute and he be wealthy, a situation apparently of rare occurrence.[13] The amount of the judgment is measured by the financial losses of the beneficiaries.[14] Logic and policy insist it be distributed on the same basis.

The section provides that the various shares are to be determined by the court upon application of any interested party, and, in the absence of such application, by the surrogate of the county

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7 L. 1949, c. 638, § 1.

8 Leg. Doc. (1949) No. 65 (C), p. 13.

9 L. 1949, c. 638, § 3; L. 1949, c. 639.

10 For example, subd. 1 provides that a surviving spouse takes the entire amount if no children survive.

11 D. E. L., § § 83 and 134.

12 Leg. Doc. (1949) No. 65 (C), p. 9. The Law Revision Commission refers to Matter of Snedeker v. Snedeker, 164 N. Y. 58, 58 N. E. 4 (1900), where the Court of Appeals reluctantly approved distribution of the recovery between decedent's widow, who had no means of support, and his father, who was financially secure. The Commission, seemingly unaware that subd. 1 (see note 10) was enacted in L. 1911, c. 122, states that the amendment of 1949 will prevent such an incongruous result. But that the subdivision means what it says, see Matter of Meng, 227 N. Y. 264, 125 N. E. 510 (1919).

13 The Commission failed to cite a case in which that result was obtained and the editor's investigation revealed none.

14 D. E. L., § 132.

in which the letters of administration were issued. Subdivision 5 grants the court making the division jurisdiction to entertain questions of disqualification for abandonment or non-support arising under subdivisions 2, 3 and 4.

The final paragraph, as amended, allows the court to fix and deduct the expenses of the action, and the medical and funeral expenses if they were included in the recovery.

DOMESTIC RELATIONS LAW

Sec. 81 amended[1]*—Appointment of guardians by parent*

The section now permits the parent first dying to appoint by will a guardian of a minor child when the surviving parent is an adjudicated incompetent at the time the will is admitted to probate. In the event that the survivor becomes competent before the infant attains majority, the court which issued letters of guardianship may, upon application of the surviving parent, revoke the letters.[2]

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1 L. 1949, c. 251.

2 The amendment was recommended by the Executive Committee of the Surrogates' Association of the State of New York. 14 McKinney's Consol. Laws of N. Y., 1949 Supp., p. 82.

GENERAL BUSINESS LAW

Art. 8 Sec. 89b added—Garages and parking places; agreement exempting from liability for negligence void*

This new section invalidates agreements which purport to exempt owners of garages and parking lots from liability for their own negligence in handling and storing motor vehicles.[1]

Prior cases have generally caused provisions in contracts of this nature to lose their effect by either holding that there was no adequate notice to the bailor of the special provision,[2] or by a strict interpretation of the language used.[3] It was never specifically held, however, that a bailee for hire could not exempt himself from liability for his own negligence.[4]

At least one case[5] classified garagekeepers as warehousemen under Article 9 of the General Business Law. This article contains a prohibition against agreements which would impair the warehouseman's obligation to exercise a reasonable degree of care with goods entrusted to him. The case was reversed on the facts,[6] however, and that particular part of the opinion was dicta.[7]

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* L. 1949, c. 332, § 1.

1 No person who conducts or maintains for hire or other consideration a garage, parking lot or other similar place which has the capacity for housing, storage, parking, repair or servicing of four or more motor vehicles, as defined by the Vehicle and Traffic Law, may exempt himself from liability for damages for injury to person or property resulting from the negligence of such person, his agents or employees, in the operation of any such vehicle, or its housing, storage, parking, repair or servicing or in the conduct or maintenance of such garage, parking lot or other similar place and any agreement so exempting such person shall be void.

2 208 App. Div. 6, 203 N. Y. Supp. 421.

3 5 N. Y. 375.

4 Leg. Doc. (1949), 65 (M), p. 11.

5 290 N. Y. 445, 49 N. E. 521.

6 Ibid.

7 Leg. Doc. (1949), 65 (M), p. 11.

There are no cases as yet under the statute, but it would seem that the act was directed specifically at garage and parking lot owners who attempt to limit their liability through exemption clauses and signs on the premises[8] where the garagekeeper is a bailee for hire.[9] Assuming this to be true, the question will still arise in the first instance whether the defendant in a particular case is a bailee for hire or a mere lessor of parking space[10] in determining the nature and extent of his liability.

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8 Ibid p. 9.

9 Ibid p. 10.

10 263 N. Y. 434, 189 N. E. 483.

INSURANCE LAW

Section 59-a Added[1]*—Service of process on Unauthorized Insurers*

In 1949, the Insurance Law was amended by the addition of a new section, 59-a, providing a method of constructive service on unlicensed insurers. The purpose of the change is to subject unlicensed insurers to the jurisdiction of the New York courts in suits by resident insureds or beneficiaries holding policies issued or delivered in this state by such insurers. Heretofore, since such residents were frequently unable to serve process on such insurers within this state[2] they were compelled to resort to distant forums for their remedies.

The provisions of the amendment follow rather closely those of Sections 5 and 7 of the Uniform Unauthorized Insurers Act.[3]

Any of the following acts in this state, effected by mail or otherwise, by an unauthorized foreign or alien insurer, shall be equivalent to and constitute an appointment by such insurer of the Superintendent of Insurance as its attorney, upon whom may be served all lawful process in an action arising out of insurance contracts issued or delivered to residents of New York State or to corporations authorized to do business therein:

1. The issuance or delivery of such contracts;
2. The solicitation of applications for such contracts;
3. The collection of premiums, membership fees, assessments or other considerations for such contracts; or,
4. Any other transaction of business.

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1 L. 1949, c. 826, § 2.

2 Insurance Law, § 59 (4) prior to amendment by L. 1949, c. 826, § 1.

3 Approved by National Conference of Commissioners on Uniform State Laws in 1938 and by the American Bar Association in 1939.

The mechanics of this substituted service of process are set forth in subsection 2 (b) of the new Section 59-a and resemble those of Section 52 of the New York Vehicle and Traffic Law, relating to substituted service in the case of nonresident motorists.[4] The requirements are not identical, however.

Service of process in such actions or proceedings may be effected not only upon the Superintendent of Insurance but also upon any person within the state who is acting here as an agent for such insurer in certain specified activities.[5]

Before an unauthorized foreign or alien insurer may file a pleading in any action against it, it is required, with certain exceptions, either: (a) to deposit cash or securities or file an approved bond sufficient to secure payment of any final judgment rendered, or (b) to procure a license to conduct an insurance business in this state.[6]

The statute further provides that a plaintiff in an action against an unauthorized foreign or alien insurer who, vexatiously and without reasonable cause, fails for thirty days after demand to pay a claim in accordance with the terms of the contract, may recover a reasonable attorney's fee as part of the judgment.[7] That fee shall not exceed twelve and one-half per cent of the amount of the recovery, but in no event shall be less than twenty-five dollars.

Actions or proceedings arising out of certain categories of insurance contracts are excluded from the purview of this amendment.[8]

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4 The constitutionality of substituted service on a nonresident motorist involved in an accident in the state of the forum has been upheld in Hess v. Pawloski, 274 U. S. 352 (1927).

5 Insurance Law, § 59-a, subsection 2 (c).

6 Insurance Law, § 59-a, subsection 3.

7 Insurance Law, § 59-a, subsection 4.

8 Insurance Law, § 59-a, subsection 5.

LIEN LAW

Sec. 189, subd. 2, par. (b) added[1]*—Liens of Hospitals*

The attachment of a hospital lien to recoveries under the survival statute[2] or the wrongful death statute[3] is now limited to instances where the reasonable medical expenses incident to the injury were an element of the damages recovered. An amendment to Section 132 of the Decedent Estate Law excludes hospital expenses from the recovery for wrongful death except when a husband, wife, or next of kin has paid them or is responsible for their payment.[4] The purpose of the addition to Section 189 is to preclude the possibility that such expenses might be deducted from a recovery of which they did not constitute an element. Inasmuch as the recovery for wrongful death is to compensate the spouse and next of kin for pecuniary injuries, and not to reimburse the estate, no reason is apparent why such recovery should be subject to attachment by the hospital, a creditor of the estate.[6]

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1 L. 1949, c. 638, § 4.

2 D. E. L., § § 119, 120.

3 Id. §,130.

4 L. 1949, c. 638 .

5 Leg. Doc. (1949) No. 65 (C), p. 15.

6 Id.

REAL PROPERTY LAW

Section 297-b added[1]*—Recording of Certified Copies of Judgments affecting Real Property*

This addition to the Real Property Law authorizes the recording of judgments, final orders or decrees affecting the title to or possession, use or enjoyment of real property, in the office of the recording officer in the county where the real property is situated in the same manner as conveyances of real property are recorded.[2] Prior to this addition, such judgments or decrees could be recorded only in the court of the county where the action was brought. There was no provision for their recordation among the land records in the county of the situs . While, of course, actions affecting real property are usually brought in the county in which the land is situated,[3] it is possible to have a valid judgment rendered in another county, as improper venue does not affect the jurisdiction of the court if the venue requirement is waived.[4] Prior to enactment of Section 297-b, where a judgment was so rendered in another county, there would have been no record of such judgments except in the court records of that county, thus creating in such cases, a serious and almost undetectable flaw in the chain of title.

It should be noted that the addition in question is permissive in character, not mandatory, and does not change existing rules of law as to constructive notice of the judgments, final orders or decrees.[5]

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1 L. 1949, c. 447, Eff. Sept. 1, 1949.

2 R. P. L., § 297-b.

3 C. P. A. §183.

4 R. R. Co-op Bldg. and Loan Assn. v Cocks, 248 App. Div. 950, 290 N. Y. Supp. 611. Also C. P. A. § 186.

5 This change in the law was recommended by the Law Revision Commission. See Leg. Doc. (1949), No. 65 (E).

STOCK CORPORATION LAW

Art. 4, Secs. 35, 36 Repealed, New Secs. 35, 36 Added[1]—
Amendment of Certificates of Incorporation

As amended, section 35 entitled "Amendments of Certificate of Incorporation" provides that a corporation may, by filing a certificate as provided in section 36, amend its certificate to effect any of the purposes included in former sections 35 and 36. In addition, it may so file to change its name, extend its duration, or change its address to which the Secretary of State is directed to mail copies of process against the corporation. A corporation may now include in one certificate all the changes it wishes to make. The authorized changes under new section 35, subdivision 2, are arranged in the order of items of a certificate of incorporation as specified in section 5 of the Stock Corporation Law. Matters constituting reclassification of shares are transposed from former section 36 paragraph E with minor changes.[2] A new provision in subdivision 4 provides that no change under section 35 shall be effective to reduce the capital of a corporation unless the certificate filed shall specifically state that the capital is thereby reduced.

New section 36 governs the form and content of a certificate filed to effect any purpose authorized by new section 35. Special provision for corporations created by special act without a certificate of incorporation is made, and such certificates, as for regular corporations, must identify the change that would have been made in a certificate had the corporation had one. Former section 36 required certain information, which, because the text of the certificate of amendment now states it, is no longer required

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1 L. 1949, c. 805.

2 A reference to installments of a sinking fund not yet accumulated is inserted. An adoption, renewal, change, or striking out of a provision authorized by section 9 of the Stock Corporation Law is expressed not to be a reclassification.

except where shares are changed as to class or number, and where par value shares are changed to no par value shares or vice versa. Subdivision 4 requires the certificate to show the amount of capital reduction as well as to note the change.[3]

The purpose of these amendments is to simplify the form of the certificates filed by a stock corporation to amend its certificate of incorporation, by eliminating present requirements of information which is not pertinent and by permitting a corporation to combine in one certificate all changes in the provisions of its certificate of incorporation. They require that provisions of the certificate of incorporation affected by the amendment be identified and that the text of each provision changed or new provision added be set forth in the certificate filed. They also clarify the existing law with respect to classification or reclassification of shares and with respect to reduction of capital.[4] Former section 35 permitted a limited number of changes[5] and prescribed the method for making such changes, while former section 36 set out the same procedure for making changes in respect to shares, capital stock, or capital. The amendments have improved the form and content of amendatory certificates without altering the previous law defining the amendments which corporations are permitted to make, or the action of stockholders requisite for various amendments, or the consequence of such amendments.[6]

Art. 4 Sec. 40 Added[7]*—Restated Certificates of Incorporation*

In conjunction with the changes made in section 35 and 36 the legislature also enacted a new section entitled "Restated

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3 Conformity changes to the over-all revision of sections 35 and 36 have been made in sections 11, 21, 27, 28, 37, 38, and 51 of the Stock Corporation Law, section 53 of the Insurance Law, section 609 of the Banking Law, and section 8-a of the Railroad Law.

4 1949 Legislative Document No. 65 (F). Note comment of the Law Revision Commission at pages 19, 20.

5 The section is headed, "Change of Purposes, Powers, or Provisions, or number of Directors, or Location of Office."

6 New York State Bar Association Bulletin; October 1949; page 349. A complete analysis of these and other amendments to the Stock Corporation Law and the General Corporation Law is found in this article.

7 L. 1949, c. 804.

Certificate of Incorporation." This extends the new coverage of sections 35 and 36 to permit a corporation to restate its entire certificate of incorporation. A corporation may under this section file a restated certificate which makes no changes; but it must state that the certificate is restated "without change in the effect, meaning or substance thereof." The object of section 40 is to permit a corporation to obtain a single document containing the certificate of incorporation plus all amendments made to date.[8]

Art. 3 Sect. 25 Amended[9]

This section relating to the manner of service of process on the Secretary of State in order to obtain jurisdiction over a corporation, has been broadened to permit service on an associate, senior, or assistant corporation examiner.[10]

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8 See generally, 1949 Legislative Document No. 65 (P).

9 L. 1949, c 292.

10 A like change was made in section 217 of the General Corporation Law and a conformity change in Article 8, section 91 (8) of the Stock Corporation Law.

UNIFORM SUPPORT OF DEPENDENTS LAW

Unconsolidated Laws, Title 7, Chapter 1-B, Section 2111 through Section 2120 Added[1]*—Proceedings to Compel Support*

The purpose of this act is to create a new civil procedure, complete within itself, whereby a person may be compelled to support such dependents[2] as he is legally liable to support[3] even though these dependents are not now, nor may never have been, either domiciled in or residents of, the state in which the person chargeable with support is residing.

The act is operative only in cases where the person petitioning and the person chargeable with support are either residents of, or domiciled in, the same state, or in states which have reciprocal laws.[4] Similar laws have already been adopted in Connecticut, Illinois, Indiana, Iowa, Maine, Michigan, New Hampshire, New Jersey, Oklahoma, Wisconsin and also the Virgin Islands.

The procedure under the act is commenced by filing a verified petition in the appropriate court in the county in which the petitioner resides or is domiciled, stating his need for support and the name and residence of the person allegedly chargeable with such support.[5] If the respondent be a resident of or domiciled in the same state so that the court has or can acquire jurisdiction under the existing laws of that state, then such laws shall govern and control the procedure of such proceeding. If the respondent

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1 L. 1949, c. 807, eff. Apr. 25, 1949 repealing c. 790, L. 1948. Sec. 11 of c. 807 repealed the Children's Court Act of New York State, § 30-B and Domestic Relations Court Act of City of New York, § 91-A.

2 Uncon. Laws, § 2112-D states that "dependents" shall mean and include a wife, child, mother, father, grandparent or grandchild who is in need of and entitled to support from a person who is declared to be legally liable for such support by the laws of state or states wherein the petitioner and respondent reside.

3 L. 1949, c 807, § 3, eff. Apr. 25, 1949.

4 Id. § 5.

5 Id. § 6-a.

is not a resident of the petitioner's state then the court shall forward copies of the petition and summons to the appropriate court in the state where the respondent is located.[6]

The procedure under the act allows a denial of the facts of the petition by the respondent. Upon such a denial, the petitioner may enter such proof, including testimony of witnesses, as the court deems proper. Respondent is then allowed to reply to the proof and to cross examine the witnesses by means of depositions and written interrogatories. This is done within the respective courts in which the respondent or petitioner has appeared and is transmitted to the other court by a transcript of the court proceedings.[7] The petitioner need not appear in person in the respondent's state, but may be represented by the "petitioner's representative."[8]

This act repealed Chapter 790 of the Laws of 1948 which was passed as an alternative remedy to the expensive and ineffective criminal procedure for obtaining support for a wife or family from a husband who has abandoned them and moved to another state.[9] The new law is more effective than the provisions of the 1948 act, and is in a form which might be more readily adopted by the legislatures of other states. The act provides only an additional or alternative civil remedy, and is not meant to be construed as affecting or impairing in any way any other remedy provided in any other statute which is available to the petitioner in relation to the same subject matter.

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6 Id. § 6-b.

7 Id. § 6-e through § 6-i.

8 "Petitioner's Representative" shall mean and include a corporation counsel, county attorney, state's attorney, commonwealth attorney, and any other public officer, by whatever title his public office may be known, charged by law with the duty of instituting, maintaining or prosecuting a proceeding under this act or under the laws of the state or states wherein the petitioner and the respondent reside. Uncons. Laws, § 2112-G.

9 Sec. 899, C. Cr. P. states that persons who actually abandon their wives or children without adequate support, or leave them in danger of becoming a burden upon the public, or who neglect to provide for them according to their means are disorderly persons.

WORKMEN'S COMPENSATION LAW

Article 9 (Disability Benefits Law) Added[1]

Article 9 was added to the Workmen's Compensation Law to provide for compulsory non-occupational disability benefits through the administration of the Workmen's Compensation Board . It became effective April 13, 1949 and the benefits under the law will be payable for disabilities occurring on and after July 1, 1950.

The act applies to any employer who, after July 1, 1949, has four or more employees on at least thirty days of the calendar year,[2] and excludes certain specialized employees.[3] It also subjects employees disabled during employment or the first four weeks of unemployment to certain conditions before their right to receive compensation accrues.[4]

On July 1, 1949, the period begins for determining the employers' status; while on January 1, 1950, a temporary six months' assessment period begins for the accumulation of funds to provide benefits for disabled unemployed.

Temporary contributions at the rate of 2/10 of 1% are assessed on wages paid to employees by covered employers from January 1, 1950 to June 30, 1950. The employee is liable for half the total contribution, not to exceed twelve cents per week as to each employee.[5] The employee's permanent contribution is 1/2 of 1% of his wages paid after July 1, 1950, but this amount is not to exceed thirty cents per week.[6]

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1 L. 1949, c. 600, § 1.

2 Id § 202.

3 Id. § § 201 (5), 201 (6).

4 Id. § 203.

5 Id. § 214.

6 Id. § 209.

The weekly benefit rate is to be 50% of the employee's average weekly wage with a maximum benefit of $26 and a minimum of $10 per week,[7] but if the average weekly wage is less than $10 the benefit is the average weekly wage.

Employees are subject to a non-benefit waiting period of disability[8] and, in entirety, the period of compensable disability may not exceed thirteen weeks during a period of fifty-two consecutive weeks or during a single period of disability.[9]

These disability benefits are subject to certain exclusions and reductions.[10] It is to be noted that among those excluded are claimants under the care of an "authorized" licensed physician, those whose injuries were self-inflicted or received in the perpetration of an illegal act or while performing work for remuneration or profit; also excluded are disabilities arising in connection with pregnancy, or an act of war occurring after June 30, 1950, or those that commenced prior to the time the employee became eligible under this act.

The benefits are reduced by any amount of Old Age or Survivor's Insurance benefits and in connection with this, it is to be noticed that if benefits are received under any Workmen's Compensation Act, any other disabilities act or under the Federal Employer's Liability Act, the benefits of this provision are not available. Also serving to reduce benefits are annuities or pensions provided by the same employer, or annuities under any employer program, or any governmental program, except a veteran's disability program.

The benefits payable to the *unemployed* disabled after the first four weeks of unemployment are paid from a special fund administered by the chairman but disability benefits are not payable beyond the twenty-sixth week of unemployment.[11] If the disabled employee is currently receiving unemployment insurance

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7 Id. § 204 (2).
8 Id. § 204 (1).
9 Id. § 205 (1).
10 Id. §§ 205, 206.
11 Id. § 207.

benefits at the time disability commences, he is not subject to the non-benefit waiting period of seven days and the aggregate of disability benefits payable is thirteen weeks during any period of disability or during a period of fifty-two consecutive calendar weeks, including disability benefits both during employment and unemployment.

The employer may provide these benefits by insurance under various plans,[12] and any exempt employer is free to provide voluntary coverage. The employer may provide for payment of the disability benefits by insurance on a premium basis with the State Insurance Fund, or a stock or mutual company or recriprocal insurer authorized by the Superintendent of Insurance; by approved self-insurance, subject to certain requirements; by a plan in existence on the effective date of the law, April 13, 1949, and which continues to be in existence on July 1, 1950; or by a new plan to be effective after April 13, 1949 providing benefits at least as favorable as benefits under the law.

The claims for disability are presented to employer for payment with satisfactory medical evidence of disability. If any claim is disputed, the Workmen's Compensation Board has authority to resolve the dispute.[13]

This law provides for non-occupational disabilities while the Workmen's Compensation Law provides benefits for occupational diseases. If any dispute arises as to which law applies, the employee receives disability benefits pending determination of his claim for Workmen's Compensation benefits.[14]

There are stated penalties for violation by any employer, carrier, employee or physician.[15]

This new amendment rests on the assumption that, in most instances, employers and employees can resolve their problems

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12 Id. §§ 211 (1), 211 (2), 211 (3), 211 (4), 211 (5).

13 Id. § 221.

14 Id. § 206 (2).

15 Id. §§ 220 (1), 220 (3), 220 (4), 220 (5), 220 (6), 209 (5), 210 (4), 213, 220 (2), 220 (5).

as to disability benefits through a state agency with functions of setting standards, supervising employee's compliance and adjudicating disputed claims.

While Unemployment Compensation benefits are suspended during illness, this law provides instead for payments to such disabled employees from the special fund set up by this amendment . It thus insures security for a class of employees heretofore neglected.

THE EFFECT OF EXTRATERRITORIAL DIVORCES ON JUDICIAL SEPARATIONS

Plaintiff wife obtained, in 1942, a New York judgment of permanent separation from the defendant, on the ground of his abandonment without cause. The defendant husband then went to Nevada and obtained a divorce in that state on the ground of extreme cruelty occurring subsequent to January 22, 1942 (the date the New York separation decree was filed).

The wife appeared by attorney, and by her answer contested the allegations of residence and cruelty; and as a separate and distinct defense pleaded the decree of separation. The husband admitted the separation decree in his reply but denied it was res judicata of all the acts of extreme cruelty alleged in his complaint. The effect of the New York judgment as being res judicata of all causes of action before January 22nd, need not be delved into here, for the Nevada court granted the divorce solely on grounds accruing subsequent to the separation.

The Nevada record showed that the finding of facts "six" when submitted to the court read, "that no claim by way of cross complaint or prayer or allegation by pleading or otherwise was made by the said defendant for alimony, maintenance or support . . . That every and all such claim was waived in open court by the attorney for the defendant." Before signing the findings the last sentence of fact "six" was stricken by the court. The following provision was submitted to the court as part of the conclusions of law: "and that the defendant be denied relief by way of alimony, maintenance or support . . . " This provision was likewise stricken by the court.

The husband continued to pay the alimony provided in the separation decree until shortly before this appeal. In this action by the wife to have the alimony increased, the trial court sustained the husband's contention that the Nevada divorce dissolved the marriage and cut off his duty of support.

The Appellate Division admitted that she may not attack the Nevada decree's effect of dissolving the marital status since she appeared in Nevada;[1] but, refused to allow the decree of divorce to cut off her right of support on the following grounds:

1 That, although Nevada had jurisdiction to render a decree affecting alimony, it did not pass on any question of support and in effect disclaimed any such exercise of jurisdiction.

2 The husband by his subsequent conduct is estopped from asserting that the Nevada court determined the question of support.

3 That the Nevada decree is not entitled to full faith and credit, as to the issue of support, for on its face it fails to give full faith and credit to the New York decree of separation.[2]

Thus we have what seems to be an incongruity in this decision. If a husband's duty to support his wife is predicated upon the existence of the marital status, why should not his duty be terminated by the destruction, by divorce, of that status from which the duty flows? A number of courts follow this line of reasoning and allow a divorce, which terminates the marriage, to ipso facto dissolve the husband's duty to support his wife unless the divorce decree allows alimony.[3]

New York, however, adheres to the principle that a divorce is divisible. This doctrine was set forth in the recent case of *Estin v. Estin,*[4] in which, while both spouses were domiciled in New York, the wife obtained a judicial separation with alimony. Subsequently, the husband left his wife in New York and went to Nevada where he obtained a divorce by constructive service as to

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1 accord, Sherrer v. Sherrer 334 U. S. 343 (1948).
Coe v. Coe, 334 U. S. 378 (1948).
Schact v. Schact, 295 N. Y. 439, 63 N. E. 2d 433 (1946).
Flood v. Thiesing, 273 A. D. 548, 78 N. Y. S. 2d 453 (1948).

2 Lynn v Lynn 275 A. D. 269 (May, 1949).

3 Esenwein v Commonwealth of Pennsylvania 325 U. S. 279, 89 L. Ed. 1608 (1945).

4 334 U. S. 541 (1948).
accord Krieger v. Krieger, 334 U. S. 555 (1948).

the wife who made no appearance. Upon receiving the Nevada decree the husband discontinued his alimony payments. Thereafter, the wife applied in New York for a supplementary judgment for the unpaid alimony. The husband as a defense pleaded the Nevada divorce and moved to strike out the alimony provisions. The court, following *Williams v. North Carolina,*[5] sustained the validity of the divorce. They, however, held that the Nevada decree did not erase the wife's personal right to alimony under the separation decree, for Nevada did not have *in personam* jurisdiction of the wife. The United States Supreme Court said in this case:

> "The New York judgment is a property interest of respondent, created by New York in a proceeding in which both parties were present. It imposed obligations on petitioner and granted rights to respondent. The property interest which it created was an intangible, jurisdiction over which cannot be exerted through control over a physical thing. Jurisdiction over an intangible can indeed only arise from control or power over the persons whose relationships are the source of the rights and obligations."[6]

The *Estin* case thus stands for the proposition that a divorce has a dual aspect. First, it is an *in rem* proceeding wherein the marital status is destroyed; and, secondly, it has the aspect of being a personal judgment wherein rights and duties of, and to, support are adjudicated.

The court in the *Lynn* case holds that since divorce consists of the adjudication of these two aspects the Nevada court could exercise jurisdiction as to the marital status without intending such decree in any way to affect the duty of support. The court points to the modifications made by the Nevada court in its decree and concludes that Nevada expressly refrained from exercising jurisdiction over this phase of the proceeding; therefore, the wife's right to alimony is untouched.

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5 317 U. S. 287 (1942).

6 334 U. S. 541, 548 (1948).

In support of this view we find the Ohio case of *Metzger v. Metzger,*[7] in which, while an action for alimony was pending in Ohio, the husband obtained a Nevada divorce; both parties appearing. The husband set up the Nevada decree as a bar to the alimony action; but the court held for the wife on the ground that the issue of alimony had not been raised in Nevada.

The construction placed upon the *Estin* case by the *Lynn* case seems much broader than was ever intended. The substantial holding of the *Estin* case is to the effect that a personal right is unaffected by an *in rem* proceeding. In the *Lynn* case the wife was herself within the jurisdiction of the court; a situation which the court itself, in the *Estin* case distinguished: "We can put to one side the case where the wife was personally served or where she appeared in the divorce proceedings."[8] For this proposition the court cited, among other, *Coe v. Coe.*[9] In this case the wife obtained a separate support order in Massachusetts; subsequently, the husband went to Nevada and began divorce proceedings. The wife appeared and filed an answer with a cross complaint for divorce, which was granted. Returning to Massachusetts the wife began an action to have the husband adjudged in contempt of court for failing to abide by the terms of the Massachusetts separation decree and also asked that the decree be modified to award her a larger allowance. The United States Supreme Court denied her the right to contest the divorce or any of the issues therein as they were res judicata to the litigants in the first action.

The same result was reached in the New York case of *Stewart v. Stewart.*[10] The husband and wife lived apart for several years under a separation agreement which contained provisions for support of the wife. The wife then went to Nevada where she

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7 32 Ohio App. 202, 167 N. E. 690 (1929).

8 334 U. S. 541 (1948).

9 334 U. S. 378 (1948).
accord, Sherrer v. Sherrer, 334 U. S. 343 (1948).

10 198 A. D. 337, 190 N. Y. Supp. 369 (1921).
accord, Hoyt v Hoyt 265 A. D. 223, 38 N. Y. S. 2d 312 (1942).
Schact v Schact 295 N. Y. 439, 68 N. E. 2d 433 (1946).

instituted divorce proceedings. The husband appeared. In this subsequent action by the wife to recover unpaid installments of alimony under the Nevada decree, her husband as a defense pleaded that he and his wife had agreed prior to the Nevada decree that it would embody the terms of their prior separation agreement, which it didn't. The court in holding the Nevada decree binding said:

"In any event, the estoppel of that judgment extends to any material matter within the issues which were expressly litigated and determined, and also those matters which, although not expressly embraced within the issues, were or might have been litigated therein."[11]

The dissent in the *Lynn* case follows this ground of reasoning citing *Schuylkill Fuel Corp. v. Nieberg Realty Corp.*[12] wherein it was said, a judgment in an action is res judicata "not only as to matters actually litigated therein, but also as to any that might have been so litigated, when the two causes of action have such an identity that a different judgment in the second would destroy or impair rights or interests established by the first."[13]

It is true that the *Coe* and *Stewart* cases are distinguishable from the *Lynn* case in that in the *Coe* case the person to whom the divorce was granted is asserting a claim to alimony which was not provided for in the divorce decree; and in the *Stewart* case alimony was awarded by the decree of divorce; yet it seems that it is difficult to apply the language employed in the *Stewart* case and the *Schuylkill Fuel Corp.* case to the *Lynn* case without arriving at a different decision from that arrived at in the *Lynn* case. It also seems incongrous to use the *Estin* case upon which to base a decision without noting that that case expressly "put to one side" such a set of facts where the wife appears.

Had the Nevada decree, in the *Lynn* case, specified whether or not the wife was to receive alimony there is no doubt that she

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11 198 A. D. 337, 339; 190 N. Y. Supp. 369, 370.

12 250 N. Y. 304, 165 N. E. 456 (1929).

13 Id. at p. 306.

would be estopped from asserting her contention that the prior New York decree was still in force and effect.

The Nevada court had jurisdiction over her; she was there personally and could have asked for alimony . The *Lynn* case is distinguishable from the *Estin* case on this point and such a set of facts as are presented by the *Lynn* case were expressly excluded by the court in determining the *Estin* case.

It seems that the wife had her day in court when the marriage was dissolved and should then have protected her rights which flowed from that relation.

The second ground for the decision in this case estops the husband from asserting that the Nevada decree cut off his duty of support; for his continued payments lulled her into a sense of false security beyond the point of time when she could have taken an appeal in Nevada. This conclusion seems quite equitable, for the husband at all times led the ex-wife to believe that the alimony decree of New York was still in full force and effect.[14]

The third ground upon which the *Lynn* case is decided is by far the most important and of greatest general interest. The reasoning is this:

After the New York separation decree, Mrs. Lynn owed her husband no further duties except that of chastity. Therefore, the Nevada decree finding cruelty by the wife subsequent to the New York decree "was a finding which, in law, it was not possible to make in view of the adjudicated relations."[15] Their holding is that since Nevada failed to give full faith and credit to the New York decree, New York need not give full faith and credit to the Nevada decree which is invalid . For this proposition the court cites *Vickers v. Vickers,*[16] and *Harding v. Harding.*[17]

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14 The court cites no cases directly in point for this holding and the writer can find no cases making any decision on a comparable state of facts.

15 275 A. D. 269, 279.

16 45 Nev. 274, 199 Pac. 76, 202 Pac. 31 (1921).

17 198 U. S. 317 (1905).

In the *Vickers* case Mrs. Vickers obtained a separation in West Virginia on grounds of extreme cruelty. Her husband was personally served in the action; appeared and contested it. The husband then went to Nevada and sued for a divorce on the ground of extreme cruelty for events happening prior to the West Virginia decree. The Nevada court held the separation a bar to the divorce action. This case was decided upon the theory of res judicata; not upon the assumption that the duty of kindness to one's spouse is removed by a separation order.

Harding v. Harding is likewise distinguishable, for in this case Mrs. Harding was given a separation in Illinois. The husband thereafter moved to California and commenced a divorce action predicated upon the ground of wilful desertion. The United States Supreme Court held that the Illinois decree permitting the wife to live apart from her husband estopped him from asserting that the wife's living apart from him was through any fault on her part.

Thus it appears that these cases are distinguishable from the *Lynn* case; for one is decided on grounds accruing *prior* to the separation and the other merely asserts that when one has been given permission to live apart from her spouse by a competent court, the husband will not later be heard to claim desertion.

The validity of the third ground for the decision rests entirely upon the premise that subsequent to a separation decree a wife owes her husband no further duties save chastity. Sustain this premise and the Nevada decree refused to give full faith and credit to New York's adjudication of the rights and duties between the spouses; defeat the contention and the *Lynn* decision topples with the disintegration of its main premise.

It has long been held that a judicial separation does not affect the marital status. One of the leading cases on this subject is *Pettis v. Pettis*[18] in which the wife while domiciled in New York obtained an *ex parte* judicial separation. In a subsequent action by the husband to obtain a divorce on grounds of desertion in Connecticut, the court refused to recognize the New York separ-

18 91 Conn. 608, 101 Atl. 13 (1917).

ation as a defense holding that the New York court had no jurisdiction over the husband since a separation is an *in personam* action having no affect on the status of the marriage. The judicial separation "leaves the contract and the permanent contractual relation untouched, and it excuses one of the parties from the obligation of cohabitation, while still holding the other party to the performance of his other contractual duties. Such a decree must rest on the jurisdiction of a court of equity to regulate the conduct of the parties before it."[19]

There, apparently, is no dissent from this proposition that the marital status remains intact. But is it a bare status existing solely in contemplation? Is it shorn of all its incidents, save one, as the *Lynn* case assumes? It does not seem so.

By direct statutory command, in New York, a husband or wife who abandons his or her spouse may not claim under the Statute of Distribution.[20] However, a spouse against whom a judicial separation has been granted on grounds other than abandonment may, nevertheless, be a widow or widower entitled to all of the rights given such a status.[21] These property rights are not shorn by a separation.

Other courts considering the problem presented by the *Lynn* case have arrived at a different conclusion. In *Evans v. Evans*[22] the wife brought action against her husband for a divorce *a vinculo* upon grounds of habitual drunkenness accruing subsequent to a divorce *a mensa et thoro.* The Minnesota Supreme Court held the separation not to be a bar to the divorce action. "The marriage relation is merely suspended as to certain marital rights and relations, not annulled, and save as they may be regulated by the terms of the decree property interests remain undisturbed. In the case of the death of either party, the survivor becomes the widow or the widower as the case may be."[23]

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19 101 Atl. 13, 17.

20 Decedent Estate Law, § 87.

21 In re Crittenden's Estate 263 A. D. 1063 (1942).

22 43 Minn. 31, 44 N. W. 524 (1890).

23 43 Minn. 31, 44 N. W. 524 (1890).

The Arizona Supreme Court, in *Williams v. Williams,*[24] held that a previous decree of separation was a bar to a divorce on the ground of desertion; the court, however, went on to say that the divorce a *mensa et thoro* will not bar an absolute divorce on any of the other specified statutory grounds, "but such ground or grounds must arise because of the unlawful and wrongful acts of the wife and not upon acts sanctioned and authorized by judgment or decree."[25]

Perhaps the case which carries this doctrine of marital rights continuing after a separation decree to its extreme is the Minnesota case of *Kunze v. Kunze*[26] where failure of a husband to support his wife, as provided for in the separation decree, gave the wife a cause of action for divorce on the ground of wilful desertion. The court cited the *Evans* case and said; "We hold that though there is a decree of separation obtained by the wife because of cruelty of the husband, which reserves certain marital duties, the complete abandonment by the husband of his wife and the repudiation of the marital obligations which he still owes her may constitute desertion."[27]

The views taken by these courts seem well founded in public policy. No court looks with favor upon the dissolution of marriage and the breaking up of homes. Yet to follow the rule stated in the *Lynn* case in a jurisdiction which grants divorce on grounds other than adultery places the injured spouse in a very unfavorable position. Take for example a jurisdiction which grants both separations and divorces *a vinculo* on the ground of cruelty. The wife might have grounds for which she could receive an absolute divorce, yet, hoping for a possible reconciliation, she might rather procure a separation and leave the marital status intact with the possibility of obtaining a divorce if there are subsequent acts of cruelty. Under such an assumption as the *Lynn* case makes she would be forced to take the divorce, for if she

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24 33 Ariz. 374, 265 Pac. 87 (1928).

25 33 Ariz. 374, 265 Pac. 87 (1928).

26 153 Minn. 5, 189 N.W. 447 (1922).

27 153 Minn. 5, 189 N.W. 447 (1922).

doesn't, she leaves herself subject to any and all abuses her husband might heap upon her, save one. Why should any more rights be shorn from the marital status by a separation than are necessary to allow the parties to live separately? Why remove from the status those incidents which need not be removed to accomplish the purpose of the separation?

It is most certainly true that in New York the only ground for divorce after a separation is that of adultery; but that ground was the only ground existing before the separation. It seems that the New York court is attempting to impose its grounds upon the Nevada court; this cannot be done.

Carrying the logic of the New York argument to an extreme, what of a state which refused to grant absolute divorces on any grounds? Could they then say that any state which granted a divorce subsequent to a separation decree granted by the first state, though it had jurisdiction, violated the full faith and credit clause, for the reason that after a separation the marital status is stripped of each and every one of its attributes?

It is submited that the court in the *Lynn* case is attempting to define rights and duties in terms of remedies available in New York.

RESTRICTIVE COVENANTS IN CONTRACTS OF PARTNERSHIP

A group of accountants consolidated their three firms into one partnership with offices in ten major cities of the nation. A restrictive covenant in the partnership agreement forbade any member who voluntarily withdrew, to practice accounting within one hundred miles of any city in which the partnership had offices at the time of the withdrawal. Plaintiff brings this suit asking for a declaratory judgment holding the restrictive covenant invalid and enjoining the defendants from enforcing it.

Held, Judgment granted for the plaintiff; defendants are enjoined from enforcing the covenant. The court found that the covenant lacked consideration and mutuality, and that since its main purpose was to prevent the plaintiff's withdrawal from the defendant firm, it was oppressive and void as against public policy.[1]

In the opinion, the court held that plaintiff, upon withdrawing and receiving back only the capital he had invested in the firm, plus whatever salary he had earned, was not given consideration for the good will and clientele he had originally contributed. A distinction was drawn between the present case and those cases in which a sale of a business was involved, since in the sale of a business, the seller receives and keeps for himself the purchase price in return for the sale of the enterprise and its good will.

A consideration is necessary when a partnership is formed. This element may be supplied by the mutual promises of the parties or their contributions of property, labor or skill. Taking part in the business and thus rendering himself liable to third parties, as a partner, may be sufficient consideration from one

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1 Lynch v. Bailey, 275 App. Div. 527, 86 N. Y. Supp 2d 783 (1949).

who contributes no capital.[2] Partners entering into a contract of partnership may make restrictive covenants, but such restrictions must be anicillary to the contract of partnership. If subsequently made, the covenants require a new consideration.[3]

It would seem that at the formation of a partnership, each partner's pledge of his own credit to the firm, forms a valuable consideration for the pledges of the other partners, and if a restrictive covenant is included in the contract, the covenant will likewise be supported by the mutual promises of the partners to be liable for the debts of the partnership.[4] After such a conclusion is reached, it is difficult to see how a restrictive covenant which was part of a partnership agreement, after the partnership has been operating for several months, can be refused enforcement for lack of consideration.

The court also held the covenant unenforcible for a lack of mutuality. The court in so finding did not state whether this should be considered as a lack of mutuality of consideration or remedy. The ruling was based on the statutes of California[5] and Michigan[6] which declare such restrictive clauses, as are here included, to be void and against public policy.

Mutuality of consideration is a requisite of every contract. If either party fails to give consideration to the other party the contract must fail.[7] In determining mutuality of consideration in a contract it is not necessary to enter into an inquiry as to the adequacy of the consideration. Though parties bargain and in so doing accord options and privileges to the one side which are not exactly equivalent to those received in exchange, the contract will not fail for lack of consideration. However, where an option

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2 1 Rowley, Modern Law of Partnership, § 216, p. 217 (1916).

3 1 Williston, A Treatise on the Law of Contract, Vol. 5, § 1644, p. 4615.

4 Emery v. Wilson, 79 N .Y. 78 (1879).

5 Deering's California Code, 1944, Business and Professions, § § 16600, 16601, 16602.

6 Michigan, Compiled Laws, 1929, § § 16661, 16667, 16672.

7 1 Williston Vol. 1, §141, p. 506 (1936).

granted to the favored party would render his promise illusory the contracts and covenants in it will be refused enforcement.[8]

Mutuality of remedy, was one of the rules adopted by the courts of equity at an early time. No decree of specific performance could be granted to one party to the contract unless it appeared that specific performance could also be required of the other party.

In equity, where it is sought to secure a decree for the specific performance of a contract, the right to such relief depends upon the existence in the defendant of the right to similar relief. Generally, if this remedy is not mutual, the court, in the exercise of its discretionary powers, will refuse to assume jurisdiction to grant relief of this character to either party.[9]

In construing this covenant, it would seem that mutuality of consideration was not lacking, for while the partners residing in California or Michigan might have received a promise from the plaintiff not to compete, which was not supported by a valid promise from these other parties to the contract, the restrictive covenants could be supported by the contributions of good will and clientele made by these parties at the beginning of the partnership. Thus the partners who lived within jurisdiction forbidding such covenants might, as a practical matter, be in a better position to take advantage of the enforcibility of the covenant but the principle that courts do not inquire into the adequacy of consideration would seem to apply. Consideration being furnished by each side the covenant and contract would not fail for mutuality on these grounds.[10]

Mutuality of remedy would also seem to be present. The partners residing in California and Michigan might not be able to have the covenant enforced against them in these states, but could have it enforced against them in the other states in which

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8 1 Williston Vol. 1, § 115, p. 389 (1936).

9 4 Pomeroy's Equity Jurisprudence, § 1405, p. 1042 (1941) See Note 65 A. L. R. 45 (1930).

10 1 Willison Vol. 1, § 115, p. 389 (1936).

the partnership operated. Here while plaintiff could have the covenant enforced against him in New York and other states, the defendant could not have enforced the covenant against plaintiff in either California or Michigan. Thus each party has a cause of action for specific performance, in certain states and neither party has a cause of action for specific performance in the states of California and Michigan. From this conclusion it would seem that mutuality of remedy was not lacking in the contract.

The New York Court of Appeals has also distinguished between enforcement of negative covenants and affirmative covenants.[11] A court of equity will inquire to see if obligations are reciprocal before enforcing a covenant to perform some action, but a court of equity will not refuse to restrain a continuing violation of a valid subsisting obligation not to injure another merely because a privilege is awarded to one side and not given to the other side.[12]

The court further held the covenant invalid because it violated public policy and was oppressive. The main purpose of the restrictive clause was apparently to force plaintiff to remain in the service of the defendant, and to prevent him from practicing accountancy in an area where he had practiced for twenty-five years.

The tests for determining if a restraint is unreasonable so that the courts will refuse enforcement of a covenant are set forth in the Restatement of Contracts.[13] Such tests condemn any restraint which is greater than is required for the protection of the covenantee[14] or imposes an undue hardship upon the person restricted.[15] Those contracts involving a sale of a business, in which restrictive covenants are included, are construed differently than a contract of employment which includes restrictive cove-

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11 McCall v. Wright, 198 N.Y. 143, 91 N.E. 265 (1910).

12 Dockstader v. Reed, 121 App. Div. 846, 106 N.Y. Supp. 1046 (1907).

13 Restatement, Contracts, §§ 513, 514, 515.

14 Restatement, Contracts, § 515 (a).

15 Restatement, Contracts, §515 (b).

nants.[16] In construing contracts of partnership the courts apply those rules which are used in construing employment contracts.[17]

In determining if the restrictive covenant is unreasonable in an employment contract, courts distinguish the two types of knowledge which the covenant seeks to restain the employee from using. They differentiate objective knowledge obtained by the employee during the course of his employment and subjective knowledge obtained by the employee during his employment. Objective knowledge is that type which stems from the particular business of the employer, while subjective knowledge is that type which an employee retains within himself and uses to become a more efficient employee. Objective knowledge is that which the courts will restrain the use of by the employee in his new employment; but courts will refuse to restrain an employee from the use of subjective knowledge in future competition with his old employer.[18]

This view is followed by the New York courts in such cases as *Magnolia Metal Products v. Price*[19] in which the court enforced a restrictive covenant against a salesman after he had left the employer and attempted to enter the employ of a competitor. The salesman in the course of his trade had acquired knowledge of certain secret processes and customer lists for the sale of the product. This knowledge being of an objective nature the court enforced a covenant in the employment contract not to compete for five years after the termination of the employment.

In a similar manner restraint of subjective knowledge has been refused by our courts. The Court of Appeals stating, "The fact is, the plaintiff sought in this indirect way to prevent by such an agreement its employee from leaving its service and did not primarily seek to enjoin him from imparting information which

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16 1 Williston Vol. 5, § 1643, p. 4606 (1936).

17 1 Williston Vol. 5, § 1644, p. 4615 (1936).

18 1 Williston Vol. 5, §1652, p. 4647 (1936).

19 Magnolia Metal Products v. Price, 65 App. Div. 27, 72 N. Y. Supp. 792 (1901).

might do it harm. It anticipated no other harm than might come from a trained salesman carrying his acquired skill elsewhere."[20]

When examining such a covenant, the courts give great weight to the public interest and if it is considered to be unreasonable, it will be condemned as against public policy.

This view was followed in a recent New York case[21] which denied enforcement to a restrictive covenant, binding an employee not to teach dancing, for one year after she left the employment of the plaintiff, within New York City, and any other city or twenty-five miles thereof where the plaintiff might have a dance studio. The court in denying the covenant enforcement said, "Contracts by employees unreasonably limiting their right to pursue their trade or occupation in the future are held to violate public policy, because the employees' means for procuring a livelihood for themselves and family are thereby diminished. They are deprived of their usefulness and the public is deprived of the benefit of the exercise of their knowledge and skill."

Partial restraints will be allowed but courts are always strict in interpreting them. In England this principle was early recognized in several cases;[22] the New York courts also followed this interpretation in early cases.[23] This is still the prevailing view and will be followed by our courts.[24]

Here the plaintiff did not seem to possess any knowledge which would injure the defendant by its use in future competition, that could be called of the objective type. Also the covenant seemed to be more than was necessary to protect the defendant and imposed a full and unreasonable restraint on plaintiff. In

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20 Clark Paper and Manufacturing Co. v. Stenacker, 236 N. Y. 312, 140 N. E. 708 (1923).

21 Murray v. Cooper, 268 App. Div. 411, 51 N. Y. Supp 2d 888 (1944).

22 Horner v. Graves, 7 Bing. 735 (1831); Mitchell v. Reynolds, 1 P. Williams 181 (1711).

23 Chappell v. Brockaway, 21 Wend. 157 (1839); Nobles v. Bates, 7 Cow. 307 (1827).

24 1 Williston Vol. 5, § 1660, p. 4683 (1936).

refusing to enforce the covenant the court said, "In the light of what appears to be the real purpose of the restrictive clause, we may say of it what this court said of another restrictive clause that was held to have a similar purpose, namely, that it savored of servitude."[25]

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25 Haremaugh Co. v. Stampagraph Co., 197 App. Div. 66, 184 N. Y. Supp. 321 (1921) cited.

TAXATION; TRANSFERS INTENDED TO TAKE EFFECT AT OR AFTER DEATH

The settlor of an irrevocable inter vivos trust, transferred property to himself and another as trustee, to hold during the settlor's life and to apply the income for support and maintenance of his children; if they did not survive him their surviving children were to take the share to which the settlor's child would have been entitled, and if they had no surviving children the same share was to go over to the remaining children of the settlor. At the settlor's death, the corpus was to be distributed in the same manner. At the settlor's death, the Commissioner of Internal Revenue sought to include the corpus and accumulated income in the gross estate of the decedent.

Held: There was no stipulation concerning the distribution of the trust fund in the event that the settlor survived all the designated beneficiaries. The settlor, therefore, had not parted with all of his present legal title in the property and the transfer was subject to provisions of Internal Revenue Code § 811 (c). This necessitates, for estate tax purposes, the inclusion of property which was transferred with intent to take effect in possession and enjoyment at or after transferor's death.[1]

This section of the estate tax law deals with "property not technically passing at death but with interests theretofore created. The taxable event is a transfer inter vivos."[2] To ascertain the applicability of the tax law, one has to investigate the status of the parties immediately before decedent's death. It is necessary to determine the effect of his demise on the passing of the

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1 Spiegel Estate v. Commissioner Int. Revenue, 335 U. S. 701 (1949).

2 Helvering v. Hallock, 309 U. S. 106 (1939).

property.[3] In two cases,[4] the donees acquired a complete dominion over the property which prior to the donor's death they did not have. His death removed any express possibilities of reverter which he previously had in the property. In considering the principal case, the Court of Appeals[5] held that the beneficiaries had interests contingent upon surviving the settlor. They looked at the situation as it might have been, had the decedent outlived the beneficiaries; the court did not survey it from the viewpoint of the donor's death, but rather from the donee's death. This was necessary in order to discover the interest which was retained by the settlor until his death. It was an interest created by law; if the settlor survived the beneficiaries, the trustees held only the legal title and a resulting trust arose.[6] It was the retention of this possibility which subjected the corpus of the estate to federal taxation. Thus, it appears that if a resulting trust, dependent upon the death of settlor, permeates the transfer, the corpus will be taxable. The Supreme Court, however, seemed more concerned with the reversion than the resulting trust; but either is called a *possibility* of *reverter.*[7]

It is interesting to note the implications of designating the interests as contingent. Due to the presence of the contingency during the trust, there occurs the possibility of a resulting trust; the contingency of the remainders created an ever-present reversion.[8] If the remainder had been vested in the beneficiaries, then there would have been presented the problem whether the possibility of regaining the income would have been sufficient to include the corpus in the gross estate of the settlor.[9]

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3 Spiegel's Estate v. Commissioner Int. Revenue, supra; Helvering v. Hallock, supra; Klein v. United States, 283 U. S. 231 (1931).

4 Helvering v. Hallock, 303 U. S. 106 (1939); Klein v. United States, 283 U. S. 231 (1931).

5 Commissioner of Internal Revenue v. Spiegel's Estate, 159 Fed. 257 (C. C. A. 7th) (1947).

6 Bogert, The Law of Trusts and Trustees, Vol. II, Sec. 468.

7 Spiegel's Estate v. Commissioner Int. Revenue, 335 U. S. 701, 709 (1949).

8 Walsh, Commentaries Law of Real Propery, Sec. 289.

9 Compare Estate of Currie, 4 T. C. 1175 (1945) with Commissioner Internal Revenue v. Nathan's Estate, 159 Fed. 2d 546 (C. C. A. 7th) (1947).

The case evolved from the anamolous dependence of the courts upon state property law. It has been customary for the tribunals to condemn any reliance on the "various niceties of the art of conveyancing."[10] This incongruity is pointed out by Mr. Justice Burton in his dissenting opinion. He states that it is immaterial in most cases whether the condition is precedent or subsequent but it was "inescapably necessary to determine whether or not by operation of the law of Illinois such a possibility of a reverter can arise under this trust."[11] The Court of Appeals found, in accordance with the property law of the state, that the transfer to the beneficiaries was contingent upon surviving the settlor. Consequently, this was a taxable transfer of the corpus.

The estate lawyers were beset with difficulties as a result of the Spiegel decision. Questions were immediately raised whether any trust of the time which had been in use for many years could be established to meet the standards set forth.[12] The determination with which the Commissioner of Internal Revenue was pursuing the possibilities of reverter[13] has worried the practitioner considerably and any solution to the problem had to take into consideration all possibilities under which the estate might return to the settlor. Confronting the lawyer was the task of drafting new trusts which would withstand the attack of tax officials, and the amending of the existing trusts to obviate taxation.

The construction of a new trust must be in accordance with the formula created by the court in the principal case. The product must be free and clear of any corruption due to the retention of present legal title in the property. The transfer must be out and out, and must be unaffected by whether the grantor lives or dies.[14] The settlor must be certain that he conveys all of his legal interest; such a complete transfer would meet the

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10 Helvering v. Hallock, 309 U. S. 106, 117 (1939).

11 Spiegel's Estate v. Commissioner Internal Revenue, 335 U. S. 701, 724 (1949).

12 Escape from Spiegel, Daniel M. Schuyler, Illinois L., Rev., May-June, 1949.

13 Eisensteen, The Hallock Problem, 58 Harv. L. Rev. 1141.

14 Spiegel's Estate v. Commissioner Internal Revenue, 335 U. S. 701, 705, (1949).

requisite demanded by the court. To do this, in case the donees fail to survive, the final gift over must be such that it will not fail. The gift may be to a charitable institution in the event that all designated beneficiaries fail to survive the settlor. What if the charity is then non-existent? Will the doctrine of *cy pres* help? No infallible determination can be made in this respect, but it would seem that if a general charitable intent is present there should be no reverter.[15] Inasmuch as the Commissioner has argued that the designated charities might fail,[16] it is apparent that the settlor should make it quite clear that he intends the *cy pres* doctrine to apply.

The gift over may also be to the estate of the beneficiary last dying. The donor, if he is an heir of such a beneficiary will not take his interest through the original trust instrument as there is no reversion existing.[17] The doctrine of worthier title presents an additional complication. If the final gift over is to an heir of the settlor, it may be considered as a reservation of a reversion.[18] But this may be prevented by a sufficient expression that the gift *is* intended to be a remainder.[19]

Perhaps the most perplexing and challenging problem created by the *Spiegel* case involves the clarification of the status of existing trusts. In his dissenting opinion, Mr. Justice Frankfurter proposed the use of the declaratory judgment.[20] This would enable the lawyer to ascertain what interests the settlor had, as determined by the state law. Declaratory judgments, of course, may be granted only if there was an actual controversy, and cannot be based on a moot case; that is, a case which does not in fact exist.[21] Courts will not ordinarily render declaratory judg-

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15 Stewart v. Franchetti, 167 App. Div, 541, 153 N. Y. Supp. 453 (1915).

16 In Estate of Bertha Low, 2 T.C. 1114, 1124, (1943).

17 Cf. Central Hanover Bank and Trust Co. v. United States, 58 Fed. Supp. 565 (Court of Claims) (1945).

18 Doctor v. Hughes, 225 N. Y. 305, 122 N. E. 221 (1919).

19 Engel v. Guaranty Trust Co., 280 N. Y. 43, 19 N. E. 2d, 673 (1939).

20 Commissioner Internal Revenue v. Estate of Church, 335 U. S. 632, 675.

21 Carmody's New York Practice, § 1957.

ments with respect to future or contingent rights except where present rights depend on a decision as to such future rights.[22] A settlor in need of declaratory relief as to his tax status may be able to procure an adjudication, and if relief is necessary, he may be able to get reformation of the trust instrument so that there are no interests threatening to revert to plague him or his estate.[23]

The existing trusts may be amended or the settlor may set up a new trust whereby the retained interest is given away to the same donees as are suggested above as final remaindermen in any future trust. Since this alternative may involve gift tax problems,[24] it is considered more advantageous to sell the reversionary interest for adequate and full consideration in money or money's worth.

Whatever means may finally be adopted to correct existing trusts must also be taken into consideration. (Reg. 105, §86.16). This provides that transfers in contemplation of death will be included in the gross estate of the decedent, unless there was a bona fide sale for adequate and full consideration. The motives of the transferor are important under this statute and anything showing that the transfer was associated with death will render it subject to taxation. The statute has been held inapplicable where the purpose of the gift was to avoid personal income tax[25] or where the transfer involved the consummation of plans previously contemplated.[26] It would seem that the settlor who had no actual knowledge of this reversionary interest and was intending to benefit only the beneficiaries, is not making the new transfer in contemplation of death. The question is one of fact, and though the transfer is to avoid a tax which is itself

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22 See note 139 A.L.R. 1239 (1942).

23 Cf. Irish v. Irish 65 A. 2d 345 (1949) (Bill in Equity); Osborne v. Bankers Trust Co., 168 Misc. 392, 5 N. Y. Supp. 211 (1938) (Declaratory Judgment and Reformation.)

24 Regulation 108.

25 Becker v. St. Louis Union Trust Co. 296 U. S. 48 (1935).

26 Allen v. Trust Co. of Georgia, 326 U. S. 630 (1946).

intimate with death, the motive in making the original trust agreement should be important in the final determination.[27]

To alleviate the burdens imposed upon settlors, and lawyers Minnesota passed a statute declaring that there would be no reversionary interest where the terms of the trust show that there was the intention to divest oneself of all interest in the trust property or where the right to revoke the trust and make the grantor or his estate the beneficiary was irrevocably and expressly surrendered. If, but for the application of the above principles, a reversionary interest would be recognized in the settlor, then it shall be deemed to be held upon a resulting trust for the state.[28] By applying the state law, as in the principal case, the court would thus find no interest remaining in the settlor.

Because of the general confusion, opposition, and difficulties stemming from the *Spiegel* case, Congress recently passed amendments which should settle much of the present controversy and provide a guide to be followed in the future.[29]

It is now provided that any transfers made before October 8, 1949 which the transferor intended to take effect in possession or enjoyment, at or after his death, shall not be included in his gross estate if the decedent has not expressly retained a reversionary interest which exceeds five per cent of the property transferred. Similar transfers are not included within the gross estate if the reversionary interests arise by operation of law.

Thus all situations analogous to the *Spiegel Trust,* established before the effective date, will be exempt from the estate tax provision involved in the principal case. It was strongly argued in that case that transfers involving possibilities of reverters arising by operation of law were not within the doctrine of *Helvering v. Hallock.* Moreover, the doctrine of *de minimus* was rejected

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27 Compare Vanderlip v. Commissioner Internal Revenue, 155 F. 2d 152 (C. C. A. 2d 1946) with Denniston v. Commissioner Internal Revenue, 106 F 2d 9251 (C.C.A. 3rd 1939).

28 Minnesota, L. 1949, c. 201.

29 Technical Changes Act, 1949, § 7.

by the court, which held that the value[30] of the reversionary interest was not the question to be resolved. Mr. Justice Burton pointed out that the remoteness of the interest was indicative of the intent of the settlor.[31] The amendment supports that argument as to trusts created before October 8, 1949 and also affects trusts under the *Hallock* rule, where express reservations were involved.

The above amendments apply to estates of persons who died after February 10, 1939. Claims for refunds may arise, many of which will have been barred by the statute of limitations. Such claims will be allowed if presented within one year from the effective date of the new statute. For the purposes of the above amendment, a reversionary interest consists of a possibility that the estate transferred by the decedent may return to him or his estate, or be subject to a power of disposition by him. Neither situation will exist where the income alone is involved. Thus, in the *Spiegel* case, if the remainders had been vested, there would have been only a possibility of a resulting trust of income. Under the above provision, there would be no tax.

The new law provides different treatment for transfers occurring subsequent to October 7, 1949. It is no longer material that any reversionary interest is retained by the settlor. If it is necessary to survive him to get possession[32] and enjoyment of the

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30 "De minimus non curat lex" is the maxim invoked by courts as justifying their refusal to act in cases where relief would concededly be afforded were a more substantial matter involved. It is inapplicable in matters of absolute right and cannot be invoked to warrant an unauthorized invasion of property rights of another. See note 44 A. L. R. 168 (1925).

31 Spiegel's Estate v. Commissioner Internal Revenue, 335 U. S. 701, 729 (1949).

32 The following example illustrates that no reversionary interest is necessary: "The decedent after October 7, 1949, transferred property in trust to accumulate the income during his life and at his death to distribute the principal and accumulated income to his son or his son's estate. The transfer is taxable since possession or enjoyment of the property cannot be obtained except by surviving the decedent." Conference Committee Report, Technical Changes Act 1949, Example (3) under 811 (c). The result of the preceding illustration is to effect an overruling of Reinecke v. Northern Trust Co. 278 U. S. 339 (1929) wherein it was held that gifts which actually took effect in possession and enjoyment after the donor's death were not taxable as the deceased retained no control over the property.

property, the estate is taxable. If the beneficiary must survive the earlier event to occur as between settlor's death or another contingency which in fact does not occur during decedent's life, the estate is also taxable. However, if the property could have been obtained by beneficiary through the exercise of a power of appointment and the power was in fact exercisable immediately before the decedent's death, then the estate is not taxable.

In *Goldstone v. United States*,[33] it was held that an estate was taxable because the decedent might obtain the property if he survived the beneficiary who had exclusive dominion over the property during his life. The beneficiary had a power of appointment which could have been exercised during her life to prevent the property from returning to the decedent. "The string that decedent retained over the proceeds of the contract until the moment of his death was no less real or significant because of the wife's unused power to sever it at any time."[34] Under the new ruling if such a power exists in the beneficiary, the estate is not taxable.

The essence of the estate tax on transfers intended to take effect in possession or enjoyment at or after death, is primarily for the purpose of barring colorable transfers which are in effect testamentary dispositions. If the settlor retains any control over the property up to the moment of his death, it is obvious that possession and enjoyment are obtained by the beneficiary only at or after his death. There is a marked distinction between vesting in possession after death which is important, and it is no longer necessary that any interests be transferred or obliterated at, or retained until, the death of the transferor in order that the property is taxable.[35] If one can receive property from a testator only by surviving him, in the absence of lapse statute, why should not a statute designed to prevent simulated posthumous transfers also be based on survivorship? The apparent exception in the amendment, relating to the beneficiary's power of appoint-

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33 325 U. S. 687 (1945).

34 Id at 692.

35 Walsh Commentaries Law of Real Property, § 294.

ment exercisable before the transferor's death, is probably no exception at all. For all practical purposes such a beneficiary is generally deemed the owner of the property.[36]

It seems clear that any transfer similar to that in the *Spiegel* case would be taxable since it was necessary that the beneficiaries survive the settlor to get the possession of the property. This would be true whether or not there was any reversionary interest in the settlor. This would seem to render superfluous any of the "technicalities of the law of property."[37] As stated in the *Hallock* case, "the importation of these distinctions and controversies from the law of property into the administration of the estate tax precludes a fair and workable tax system."[38] In his dissenting opinion in the *Spiegel* case, Mr. Justice Burton states: "A Federal policy of complete dependence upon state laws for the application of any nation wide tax cannot fairly be attributed to Congress without a much clearer expression of such policy than appears in 811 (c). The inherent difficulty of administration and the resulting inequality of taxation as between instruments governed by the laws of different states argue strongly against such a policy."[39] It is hoped that the effect of the amendment has been to make the statute uniform throughout the nation.

The statute seems to shift the focus from the settlor's intent as to the time his gift is to take effect to the quesion of whether the beneficiary had to survive settlor in order to take the gift. However, the answer to the latter inquiry merely serves as a definite answer to the former. If the settlor is to keep a protective eye upon his issue during his life, it seems that he may transfer his property into trusts measured by the life or lives of the trustees upon whom he can place faith and confidence. In this way, the gift over avoids the problems arising when it is conditioned upon surviving the settlor or upon an alternative contingency which does not in fact occur until after his death.

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36 Walsh Commentaries Law of Real Property, §§ 323, 328, 329.

37 Helvering v. Hallock, 309 U. S. 106, 112 (1939).

38 Id at 118.

39 335 U. S. 701, 721 (1949).

TRANSPORTATION OF CHILDREN TO SECTARIAN SCHOOLS

Plaintiff seek a writ of mandamus to compel the school district board to permit their children to use transportation facilities for attendance at a religious private school within the district, basing their claim on a statute providing for public transportation of all school children who are under the compulsory attendance law. The school district board refuses to transport the children to the sectarian school, claiming that the use of public funds for other than common schools is prohibited by the State of Washington Constitution. The court held the statute invalid as contravening the constitution inhibition. *Visser* v. *Nooksack Valley School District,* 207 P. 2d 198 (1949).

In its opinion the court stated that free transportation of children attending sectarian schools was a direct, substantial, and continuing public subsidy to the schools, as such. It further agreed that transportation represents, in part at least the legislature's concern for the safety of children who must use the highway in attending schools in accordance with compulsory attendance law. The court cited and discussed with approval *Judd* v. *Board of Education,* 278 N. Y. 200, 15 N. E. 2d 576 (1938), which held that transportation of sectarian school children was indirect aid to the religious school. With reference to *Everson* v. *Board of Education,* 330 U. S. 1-74, (1946), on which plaintiffs relied, the court said: "While that case holds, on its facts, that the incidental furnishing of free transportation to parochial schools is not an establishment of religion within the prohibition of the First Amendment to the United States Constitution, nevertheless the right of the individual states to limit such transportation to children attending public schools is carefully preserved."

The case reflects one phase of the question of what is direct, or indirect, or merely incidental aid to sectarian schools, a question the courts do not answer uniformly. A review of the

transportation subsidy problem demonstrates the divers results of cases considering the statutory purpose in relation to the constitutional principle, separation of church and state.

Background of the Problem

Over the years the state courts have considered a wide variety of problems involving the principle of state neutrality in religious matters and religion's neutrality in state matters. Among the cases relating to education are those concerned with activity in the public schools; reading of the Bible; saying prayers; singing hymns; and wearing religious garb by teachers. The decisions turned upon whether the activity merely emphasized morality generally or a particular kind of morality, and whether pupil participation was optional or required.[1] Many of these issues were decided during the first quarter of the present century, or previously, and litigation for the present is dormant.

The constitutions of practically all states contain some provision prohibiting the appropriation of public money to schools controlled by sectarian organizations. The proscriptive phrasing varies in denying the use of public funds to schools (1) other than common schools or (2) not under exclusive control of the state or (3) to sectarian schools or (4) to any school in which sectarian doctrine is taught.

Cases within the past ten years are primarily concerned with whether tax funds were being used in aid of sectarian or private schools directly, indirectly or only incidentally. It may be mentioned that during the colonial period and the first half of the last century, school systems were conducted under denominational supervision and often were supported by public tax funds. With the secularization of public schools, there came a gradual restriction of tax funds to the use of public schools only. Direct aid from public funds generally has been held invalid; yet there are cases where the public purpose of the activity supported has been considered of greater weight than the direct aid accruing to the

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1 "Sectarianism in Schools" 5ALR866, 141 ALR 1144.

sectarian institution.[2] The traditional exemption of sectarian school property from taxation seldom appears as a phase of the school aid issue, probably because it involves no appropriation from public money, as such. Tax exemption of church property and income tax deductions for charitable contributions by individuals are recognized generally as proper statutory immunities in the interest of public welfare. Although the tax exemption is, in effect, an aid to the sectarian school, it is not such an aid as is prohibition by the constitutions. *Board of Education* v. *Wheat,* 174 Md. 314, 199 A. 628 (1938).

Transportation of Children to Sectarian Schools

Indirect and incidental aid to sectarian schools through use of tax funds presents potentially nicer and more numerous problems in an expanding state and national education program. The furnishing of textbooks, school supplies,[3] and transportation to sectarian school children already have come under consideration.

Transportation of school pupils at public expense to public schools has been upheld as a constitutional use of public funds in the promotion of the general health and safety of the school children.[4] More recently statutes providing for transportation of pupils to other than public schools have required interpretive review of constitutional, legislative and social policies.

Nineteen states and one territory provide some means of transportation for private-school pupils where it is provided for the public school system.[5]

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2 St. Patrick Church Society v. Heermans, 68 Misc. 487 (1910). Furnishing free water to all schools was not violative of Constitution.

3 Smith v. Donahue, 202 A. D. 656 (1926); Stein v. Brown, 125 Misc. 692 (1925); Cochran v. Louisiana State Board of Education, 281 U. S. 370 (1929); Chance v. Miss. State Textbook Rating & Purchasing Board, 190 Miss. 453.

4 "Transportation of School Pupils at Public Expense." 63 ALR 413.

5 Federal Council of Churches of Christ in America, publication New York—April, 1947.

Objections to the statutory provisions[6] are usually made on the theory that they are unconstitutional for various reasons. The premise regularly advanced is that transportation for children is an aid to the sectarian school, either directly or indirectly, in violation of the constitution. The resulting conclusion is that such activity constitutes a misuse of public funds, or an appropriation of public money for private purposes.

Arguments in favor of validating the statute are that the direct aid is to the child with only incidental aid to the sectarian school; that the health and safety of the child enroute to school is protected; or that the legislation furthers the compulsory education laws and is, therefore, primarily for a public purpose.

Of those state courts which have considered statutes of this type, four have found them unconstitutional, one has ruled both ways in different cases, and three have held them constitutional.[7] The judicial opinions within the cases have been conflicting when weighing the particular policies represented. Delaware, New York, Oklahoma, and Washington courts have decided that the aid is to the sectarian school either directly or indirectly.[8] California, Maryland, and New Jersey courts have ruled that the aid is to the child in that it promotes his safety on the highway and any aid accruing to the school is incidental only.[9] The Kentucky

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6 Illustrative provisions of the statutes are: furnishing transportation "of children to schools maintained in the school district and to other schools other than public" (Judd v. Board of Education, 278 N. Y. 200, (1938); "of children to and from school other than a public one, except as such school is operated for profit in whole or in part" (Everson v. Board of Education, 133 N.J.L., 350, (1946); "all children attending school in accordance with laws of compulsory attendance shall be entitled to use of transportation facilities provided by the school district in which they reside" Visser v. Nooksack Valley School District, 207 P. 2d 198 (1949).

7 Unconstitutional: Dela, New York, Okla., Wash. Constitutional: Calif., Md., New Jersey. Both ways different cases: Ky.

8 Dela. (1934) State ex rel. Traub v. Brown, 39 Del. 187, 172 A. 835. N. Y. (1938) Judd v. Board of Education, 278 N. Y. 200, 15 N. E. 2d 576. Okla. (1941) Gurney v. Ferguson, 190 Okla. 254, 122 P. 2d, 1002. Wash. (1943) Mitchell v. Consolidated School District, 17 Wash. 2d 61, 131 P. 2d 79. Wash. (1949) Visser v. Nooksack Valley School District, 207 P. 2d 198.

9 Calif. (1946) Bowker v. Baker, 167 P. 2d 356. Md. (1938) Board of Education v. Wheat, 174 Md. 314, 199 A. 628. N. J. (1946) Everson v. Board of Education, 133 NJL 350, 44 A. 2d 333.

court arrived at different results in two cases because of a difference in statutory language used.[10] Wisconsin court ruled that a school district board had no statutory authority to make a particular contract for transporting parochial school children.[11] The Delaware court, in *State ex rel. Traub et al* v. *Brown,* 39 Del. 187, 172 A. 835 (1934), held that the controlling statutes made it illegal to use public funds, whether general or school funds, for transporting parochial school pupils, since their constitution specifically prohibits use of funds in aid of sectarian, church, or denominational schools. It was the court's opinion that free transportation for pupils attending sectarian schools, is aid to the school. "It helps to build up, strengthen, and make successful the schools as organizations."

The New York Court of Appeals held the New York version of such a statute unconstitutional in *Judd* v. *Board of Education,* 278 N. Y. 200, 15 N. E. 2d 576 (1938). Since then a constitutional amendment supersedes the decision by allowing the legislature to provide for transportation of children to and from any school or institution of learning, Article XI, section 4, (1938). The rationale of the Judd case has been relied on frequently by later cases in other jurisdictions.[12] Its theory was that free transportation induced attendance at the sectarian school. "Without pupils there would be no school. It is illogical to say that the furnishing of transportation is not an aid to the institution while the employment of teachers and furnishing of books, accommodations and other facilities are such an aid."

In the same year, the Maryland courts in *Board of Education* v. *Wheat,* 174 Md. 314, 199 A. 628 (1938), ruled that providing transportation was within the function of enforcing attendance at schools under the compulsory school laws. "The institutions

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10 Ky. (1943) Sherrard v. Jefferson County Board of Education, 294 Ky. 469, 171 S. W. 2d 963. (1945) Nichols v. Henry, 301 Ky. 434, 191 S. W. 2d 930.

11 Wisc. (1923) State ex rel Van Stratten v. Milquet, 180 Wis. 109, 192 N. W. 392

12 Gurney v. Ferguson, 190 Okla. 254, 122 P. 2d 1002 (1941). Mitchell v. Consolidated School District, 17 Wash. 2d 61, 131 P. 2d 79 (1943).

must be considered as aided only incidentally, the aid only a by-product of a proper legislative function." This case was the first which held it within the police power of the state to provide such transportation as a concomitant of compulsory attendance. Other cases have employed the same police power theory, emphasizing the protection of the child against inclement weather and highway traffic hazards.[13]

The United States Supreme Court, in *Everson* v. *Board of Education,* 330 U. S. 1-74 (1946), considered for the first time an appeal from a state court on the issue of public transportation for children attending sectarian schools. The majority opinion reasoned that the child was the direct beneficiary and that the legislation was for a public purpose, education. The opinion does not clearly define the ambit within which public funds may be legally and constitutionally expended in aid of all educational services and facilities. It recognizes the difficulty which state courts have had in drawing a line between general welfare and support of religious institutions, but draws no line itself. In the majority opinion Mr. Justice Black said: "While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all citizens without regard to their religious belief . . . But we must not strike that state statute down if it is within the state's constitutional power even if it approaches the verge of that power. The First Amendment, as made applicable to the states by the Fourteenth, commands that a state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth did not strip the states of their power to meet problems previously left for their individual solutions."

Briefs filed in this case argued that any decision finding the statute unconstitutional would cast doubt equally on the National School Lunch Act of 1946 and the Servicemen's Readjustment

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13 Nichols v. Henry, 301 Ky. 434, 191 S. W. 2d 930 (1945). Bowker v. Baker, 167 P. 2d 356 (1946).

Act of 1944. The National School Lunch Act authorizes federal funds to provide lunches and lunchroom equipment for children in both public and non-profit private schools of the states; where this is barred by state constitutions, the Secretary of Agriculture has authority to make the federal contribution directly to the school. Under the Servicemen's Readjustment Act of 1944, 38 USC, section 701, the government pays for books and tuition to schools which may be private or sectarian, at the student's election. Additional laws passed by some states provide for the transportation of veterans and teachers to such schools where housing in the immediate vicinity is inadequate to meet the needs of students, teachers, and employees. New York Public Housing Law, section 200, subdivision 6.

Judicial opinion by state courts has been expressed at an earlier date on the constiutionality of veterans benefits. In *Opinion of Justices,* 214 Mass. 599 (1913), it was stated: "There is no constitutional prohibition of appropriations for higher educational institutions, societies or undertakings under sectarian or ecclesiastical control." In *State ex rel. Atwood* v. *Johnson,* 170 Wis. 251, 176 N. W. 224 (1920), the court expressed its rationale as follows: "Only actual increased cost to such schools occasioned by the attendance of beneficiaries is to be reimbursed. Mere reimbursement is not aid."

Conclusion

State-subsidized transportation for sectarian school children continues to present a question resolved in diverse ways by state courts. Many state legislatures have passed statutes providing for such service. A few courts have sustained this appraisal of what constitutes a public purpose, while other courts have failed to be convinced that the constitutional principles were not being violated. The Supreme Court's decision in the *Everson* case expressly leaves the problem for state legislatures and courts to decide in accordance with their own constitutional provisions, finding no violation of the First Amendment or the Fourteenth Amendment of the federal Constitution in that instance. The Washington State court in the first decision since the *Everson* case expressly rejected the majority opinion and followed the

theory of the minority that transportation of pupils constituted aid to the school.[14]

The Supreme Court of the United States and all state courts reaffirm the constitutional principle of separation of church and state and the necessity of preventing any circumvention of the precept through the use of tax funds.[15] Underlying the problem is the sphere in which legislation of the present period is primarily directed. The constitutional concept was framed when the principal concern of statesmen was ordering life and regulating it into proper spheres of activity, while present day legislators are primarily concerned with balancing and adjusting economic interests in relation to the overall economy. It is inevitable that, with the increased responsibility which the federal government has assumed by providing funds for educational facilities, the constitutional question, and its proper limits under health, safety, and welfare provisions of the police power, will present a recurring problem in the future.

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14 Visser v. Nooksack Valley School District, 207 P. 2d 198 (1949).

15 U. S. (1946) Everson v. Board of Education, 330 U. S. 1-74. Cal. (1946) Bowker v. Baker, 167 P. 2d 356. Del. (1934) State ex rel. Traub v. Brown, 39 Del. 187, 172 A 835. Ky. (1943) Sherrard v. Jefferson County Board of Education, 294 Ky. 469, 171 S. W. 2d 963. Ky. (1945) Nichols v. Henry, 301 Ky. 434, 191 S. W. 2d 930. Md. (1938) Board of Education v. Wheat, 174 Md. 314, 199 A. 628. N. J. (1946) Everson v. Board of Education, 133 NJL 350, 44 A. 2d 333. N. Y. (1938) Judd v. Board of Education, 278 N. Y. 200, 15 N. E. 2d 576. Okla. (1941) Gurney v. Ferguson, 190 Okla. 254, 122 P. 2d 1002. Wash. (1943) Mitchell v. Consolidated School District, 17 Wash. 2d 61, 131 P. 2d 79. Wash. (1949) Visser v. Nooksack Valley School District, 207 P. 2d 198. Wisc. (1923) State ex rel. Van Stratten v. Milquet, 180 Wis. 109, 192 N. W. 392.

Recent Decisions

CITY HOME RULE LAW—LOCAL LAW—TAXPAYER'S ACTION—On May 18, 1949, there was filed with the City Clerk of the City of Newburgh a petition for submission to the electors of the city of a proposed local law which would alter the city charter by adding thereto a provision fixing minimum annual salaries for members of the police department of the city. After making an examination thereof, the clerk was of the opinion that the petition was legally insufficient and so certified to the council of the city.

Within 30 days of the filing of the petition, a taxpayer of the city brought the present proceedings in the Supreme Court for an order denying the right of the electors to enact the proposed local law. In substance his objections were these: (1) the proposed local law has no relation to any provision of the existing city charter; (2) the power to fix salaries is administrative rather than legislative in character and is now validly confided by the charter solely to the council of the city. The Special Term dismissed these objections and the Appellate Division affirmed.

Held: The answer to the problem is dictated by amendments made in 1944 to Sections 2 and 19-a of the City Home Rule Law. The amendment to Section 2 added a new subdivision 5 in these words:

> "(5) The term 'charter amendment' means any change in an existing charter presented as such under authority of this chapter or any charter or state statute. A charter amendment may be of any extent and may deal with any number of subjects. A proposal presented as a charter amendment shall not be rejected as such on the ground that it constitutes a new charter." (L. 1944, c. 602).

The amendment to Section 19-a made that section applicable to a local law amending a city charter "however extensively." (L. 1944, c. 602). In the light of these amendments, the proposed local law cannot be successfully questioned on the score of its being wholly alien to the text of the charter of the city of Newburgh. The court disposed of the second objection of the taxpayer stating that the amendments to the City Home Rule Law now make the distinction between administrative and legislative powers entirely inadequate as a reason for invalidating a charter amendment proposed to be made by a local law. *Warden v. Police Department of the City of Newburgh,* 300 N. Y. 278 (1949).

In the *Warden* case, the petitioner relied upon the decision in *Matter of Astwood v. Cohen,* 291 N. Y. 484, 53 NE 2nd 358 (1944). In the *Astwood* case, the local law proposed would have provided a bonus to policemen and firemen of the City of New York. The court pointed out that New York City is governed by a short form charter and an Administrative Code, stating: "The proposed local law amends nothing in the charter and the provisions of law which are amended are found in the Administrative Code. Granting a salary bonus to city employees is quite unrelated to any provision of the New York City Charter and the grant proposed in no sense alters or changes any provision contained in the charter. The proposal here totally ignores the existing law and with complete independence thereof awards a bonus to city employees by popular vote. The only law proposed to be amended is the Administrative Code and it may not be amended in the manner here proposed. Section 19-a restricts the use of initiative and referendum to charter amendments."

The *Warden* case is distinguished from the *Astwood* case since the local law proposed in the latter did not purport to amend the city charter but, in fact, constituted an amendment of the Administrative Code. The *Astwood* case, therefore, afforded no solution to the problem presented to the court in the *Warden* case.

In *Matter of Grenfell (Lawyer),* 269 App. Div. 601, decided in 1945, there was filed in the office of the clerk of the City of Schenectady a petition for submission to the electors of the city

of a proposed local law amending the city charter. The petition, purportedly filed under Section 19-a of the City Home Rule Law, proposed the submission to the voters of Schenectady of a local law to amend the existing form of city government, which was Plan C under the Optional City Government Law, by a repeal of the present system and a return to the former government under the Second Class Cities Law under which the city was governed prior to 1934. The Supreme Court in 185 Misc. 558, found the petition invalid upon three grounds, one of which was that it proposed a new charter rather than an amendment. The Appellate Division (3rd Department) did not agree with this ground assigned by the Sepcial Term for rejecting the petition.

The Court stated: "It was held in *Matter of Maylender v. Morrison,* 260 App. Div. 892, aff'd 284 N. Y. 575, 29 NE 2nd 395 (1940), decided in 1940, that an amendment, which was, in effect, a proposal to create a new city charter, could not be submitted under Section 19-a of the City Home Rule Law. However, the City Home Rule Law was amended in two very significant particulars. (The court here referred to the amendments.) A more direct legislative answer to the judicial decision can scarcely be envisaged and we are bound to assume that the construction of the former statute as exemplified in the *Maylender* case is no longer to be followed. It should be noted that Section 20 of the City Home Rule Law, which the Special Term held was the only section under which it was proper to submit a new charter, is permissive and not mandatory. Moreover, Section 31 of the City Home Rule Law provides in part: 'A permissive procedure authorized by this chapter shall not be deemed to be exclusive or to prohibit the use of any other procedure authorized by any act of the legislature, city charter or local law lawfully adopted but shall be deemed an alternative thereto.' We think, therefore, that an objection to the petition on the ground it proposed amendments so extensive as to constitute a new charter may not be sustained." (The petition was, however, declared insufficient for other reasons.)

Prior to the 1944 amendments to City Home Rule Law, two attempts had been made to have these amendments passed. In 1942, a bill to amend the City Home Rule Law in relation to

the scope of charter amendments was introduced in the state legislature. The proposed bill would have amended Sections 2, 19-a and 20 (2) of the City Home Rule Law to provide that the method of amending a charter in Section 19-a shall also be available for the adoption of a new charter. The proposed bill was a result of the decision in the *Maylender* case *(supra).*

The Committee on State Legislation of the Bar Association of the City of New York stated *(Association of the Bar of the City of New York—Bulletins of Committee on State Legislation—1942—Report No. 279, p. 741)* that the method for submitting a charter amendment contained in City Home Rule Law Section 19-a was a desirable one and its safeguards were adequate regardless of the extent of the changes proposed.

The bill, however, was vetoed by the Governor *(Public Papers of Governor Herbert H. Lehman, 1942, p. 282)* who stated that he was in sympathy with its purposes but that it should contain a provision similar to the provision contained in Section 20 of the City Home Rule Law requiring the submission of a separate question for the election of elective officers by a system of proportional representation.

In 1943, a similar bill was introduced in the legislature. This bill was for the purpose of amending Sections 2 and 19-a of the City Home Rule Law to permit the amendment of a city charter by the method provided in Section 19-a of the City Home Rule Law, no matter how extensive the amendment might be, even to the extent of enacting a new charter thereby.

The Committee on State Legislation of the Bar Association of the City of New York disapproved of the bill *(Association of the Bar of the City of New York—Bulletins of Committee on State Legislation—1943—Report No. 137, p. 403)* stating: "This bill is obviously directed at overcoming the decision in *Maylender v. Morrison,* 260 App. Div. 892, aff'd 284 N. Y. 575 29 NE 2nd 395 (1940)." The committee then indicated what its objection to the bill was. With this objection we are not now concerned for it is no longer valid, having been nullified by 1944 amendments to Section 19-a of the City Home Rule Law not here material.

After making this objection, the committee then proceeded: "Even if this objection were not present, it is the opinion of the committee that a new charter should be prepared only after the most careful consideration by a duly qualified group legally responsible to the voters, such as a local legislative body or a charter commission, as the present law provides. The bill under consideration would permit outside groups, without restriction as to their capacity or responsibility, to prepare and have submitted new charters to the voting public without such safeguards."

The bill was again vetoed by the Governor *(Public Papers of Governor Thomas E. Dewey—1943, p. 176)* who added the following memorandum: "This bill amends the City Home Rule Law. It provides that proposed amendments to a city charter may include any change no matter how extensive, even to the inclusion of an entirely new charter. Other provisions of the City Home Rule Law provide that new charters may be submitted to the people upon petition of fifteen per cent of the voters. Amendments on the other hand may be submitted to the people upon petition of ten per cent of the voters. The effect of the bill, therefore, would be to circumvent, in case of a new charter, the requirements of the City Home Rule Law that a new charter be submitted upon petition of fifteen per centum of the voters. The effect of the Bill is also to circumvent a provision of the City Home Rule Law which provides that any new charter including a provision for the election of officers by any system of proportional representation shall be submitted as a separate question to the voters. Although sincerely sponsored as a device that would be conductive to good government, there is a grave doubt that it will have such effect."

In 1944, the bill was passed by the legislature and approved by the Governor. What the ultimate effect of these amendments will be on the interests of the general public is open to conjecture. The legislature has conferred upon the electors powers more broad than ever possessed by them in the past.

It is submitted that the 1944 amendments to the City Home Rule Law may give rise to serious budgetary problems with which municipalities will find it difficult to cope. Increased taxation will

then be resorted to. Because of benefits granted to a minority, the majority of the public will be prejudiced. It will be argued that petitions for increase in salaries of city employees in the form of charter amendments have to be approved by the majority of the voters. In theory, the argument is a valid one, but the practical aspects of the situation lead to a different viewpoint.

It is a matter of common knowledge that many of the voters do not exercise their right to vote on amendments either because of attitudes of indifference or ignorance of the contents of these amendments. It is not a difficult task for a forceful minority bloc which has centered its sights on a definite goal to accomplish the purpose of its mission when there exists an indifferent or uninformed majority.

The distinction between administrative and legislative power as a reason for invalidating a charter amendment has been abolished as held by the *Warden* case. The obliteration of such a distinction may lead to dire consequences. To what extent can the voter interfere with the administrative powers of the municipalities now that such a distinction is non-existent? Should charter amendments be adopted dealing with matters which only qualified individuals after diligent investigation are competent to deal with? In what manner these problems will be dealt with remains to be seen.

CRIMES — CONFIDENTIAL COMMUNICATIONS — HUSBAND AND WIFE—EVIDENCE—Defendant, a police officer in the City of Utica, was tried and convicted of the crimes of larceny and criminally concealing and withholding stolen property. Over defendant's objections, his wife on the trial was permitted to testify that over an extended period of time, she had observed the defendant enter their home with stolen property in his possession and secrete this property in various locations throughout the house.

Held, wife's testimony was a confidential communication between husband and wife and as such inadmissible in evidence. *Penal Law, §2445; Peo. v. Daghita,* 299 N. Y. 194, 86 N. E. 2d 172 (1949).

The court based their decision on a finding that the term, confidential communication, as used in the statute included acts performed by one spouse in the presence of the other. They concluded that the defendant would not have acted in the manner in which he did "except in reliance upon the free and unrestrained privacy of marital relation and the socially desirable confidence which exists and should exist between husband and wife." Id. at 199, 86 NE 2d 172 at 174. The court thus establishes the same criteria as regards to admissibility of testimony concerning acts as it does to testimony concerning verbal communications; that is whether such acts would not have been carried out except for the defendant's reliance upon the confidential relationship existing between himself and his wife. The case does not hold that all actions of a spouse are privileged communications but only those which actually confide in the other party the information disclosed by the conduct because of the relationship.

Other jurisdictions have previously held that such acts are privileged communications *(58 Am. Jur., Witnesses, §385; 70 C. J., Witnesses, §520).* An Indiana court stated, "It appears settled in this state and generally in the United States that privileged communications between husband and wife are not confined to mere audible communications to one another, but include knowledge communicated by an act which would not have been done by one spouse in the presence or within sight of the other but for confidence between them by reason of the marital relation." *Smith v. State,* 198 Ind. 156, 152 N. E. 803 (1926).

In a prior New York case, *Peo. v. Woltering,* 275 N. Y. 51, 9 N. E. 2d 774 (1937), there was a question of fact as to whether the witness was or was not the common law wife of the defendant. This witness had testified as to acts and conversation between herself and the defendant, and the court stated that question should have been submitted to jury "with instructions to disregard her testimony if it was found that she were his common law wife." Although the *Woltering* case did not specifically hold that acts could be privileged communications between husband and wife, the court in present case cited it as authority for their decision.

At common law the wife could not testify against her husband. This was changed by various statutes, *L. 1867, c. 887 §2; L. 1876, c. 182 §2*, and the applicable rule is now embodied in the statute in question, *Penal Law §2445*, "The husband or wife of a person indicted or accused of a crime is in all cases a competent witness on the examination or trial of such person; but neither husband nor wife can be compelled to disclose a confidential communication made by one to the other during their marriage." This statute is in derogation of common law, and any such statute must be strictly construed. *Peo. v. Houghton*, 24 Hun. 501 (1881). The court uses this as a further basis for their conclusion since at common law everything was privileged, and therefore the material removed from the privilege must be limited to the intent of the legislators as discerned from the statute.

Section 349 of the C. P. A. states that a husband or wife shall not be compelled or without consent of the other if living, allowed to disclose a confidential communication made by one to the other during marriage. It would appear, therefore, that the result arrived at in the instant case should be applicable in civil cases as well, since the reasons advanced by the court in arriving at their decision would apply to Section 349 of the Civil Practice Act as well as to Penal Law, Section 2445.

It now seems settled in New York that in criminal actions and possibly in civil actions a confidential communication between husband and wife may consist of an act or acts in addition to oral or written communications.

CRIMES—LARCENY—TAKING BY OWNER FROM ONE WITH SPECIAL PROPERTY INTEREST—Appellant was the owner of an airplane which he left with one McNary for remodeling. After a disagreement as to the value of McNary's services, the artisan asserted a lien under Section 184 of the Lien Law. While proceedings for sale of the airplane were pending, appellant, allegedly by fraud, obtained possession of the plane and removed it from the state. Appellant was thereupon indicted for grand larceny under Section 1290 of the Penal Law, and obtained a writ of habeas corpus. Following dismissal of the

writ, he now appeals. *Held,* that the indictment is sufficient, and that the allegations therein set forth, if proven, constitute larceny. *The People of the State of New York ex rel. Harry S. Travis, Appellant, v. Sheriff of Cortland County, Respondent, 275 App. Div. 444 (1949).*

Appellant's contention that the indictment is insufficient in that it alleges that McNary was only the "special owner" and that it fails to negative the title of defendant as owner of the airplane is groundless, for Section 1290 of the Penal Law contains no such requirements. It defines larceny as follows: "A person who, with the intent to deprive or defraud another of the use and benefit of property or to appropriate the same to the use of the taker, or of any other person other than the true owner, wrongfully takes, obtains or withholds, by any means whatever, from the possession of the true owner or *of any other person* any . . . personal property, . . . or article of value of any kind, steals such property and is guilty of larceny. . . " McNary, if not the true owner, certainly falls within the category of *"any other person,"* and clearly was deprived of the *"benefit of the property,"* since it was the airplane to which he was looking for the satisfaction of his lien. Therefore, if it can be proven that the airplane was taken with intent to deprive McNary of its "use and benefit," the fact that the taker and true owner happened to be one and the same person would seem to be immaterial.

Since the question of whether the general owner of property is guilty of larceny when he wrongfully takes it from the possession of one having some special interest in it, with intent to deprive or defraud such person of the use and benefit thereof, is, by the court's admission, of first impression in this state, the Appellate Division felt it necessary first to establish a "special interest" in McNary which could be the subject of larceny. In the case of *New York Yellow Cab Co. Sales Agency v. Courtlandt Garage Realty Corp.,* 223 App. Div. 44; 227 N. Y. Supp. 315, (1929), a judgment in favor of plaintiff in an action to replevy certain taxicabs which were sold by it to certain defendants and on which it took back chattel mortgages, was reversed and a new trial ordered on the ground that defendant garage company had a special property in the taxicabs, by virtue of Section 184 of the

Lien Law, and there was a failure to fix the value of the various chattels at the time of the trial as provided by Section 1120 of the Civil Practice Act. It thus appears that a lienor has a special property interest in the object of his lien. Also, from the case of *Phelps v. People,* 72 N. Y. 334, (1878) wherein the defendant was indicted and convicted of larceny of a bank draft upon an averment that the ownership of the draft was in the State of New York, it appears that an averment that one has a special property interest in the article stolen is sufficient to support an indictment for larceny.

Having established a special interest in the lienor which could be the subject of larceny by the general owner, and that an averment of such interest would support the indictment, the court turned to New York case law precedents to support its conclusion and found none. The closest analogy was the case of *Palmer v. The People,* 10 Wend. 166, decided in 1833. There, a constable, by virtue of an execution, levied upon the property of Palmer. Palmer subsequently sold the property, charged the constable with having taken it away, and brought suit against the constable. His action was dismissed and he was indicted for larceny. In sustaining the indictment, the court said the constable, by levying on the property had acquired a special property therein, and that Palmer was guilty of larceny in stealing his own property, when done with intent to charge another person with the value of it. Although in the instant case there was no intent to charge McNary, there was, allegedly, a clear intent to deprive him of the benefit of the property.

The courts of other jurisdictions support the proposition that a general owner who wrongfully takes from one having a special interest therein, such as a lienor, is guilty of larceny. In *Hall v. United States,* 277 F. 19, (CCA 8th 1921) a sailor took goods in possession of the bailee railroad; he was convicted of larceny, the court saying, "it was no defense that accused owned the property in question, where it was being shipped C.O.D., as, the property being in possession of the bailee, the owner had no right to take the property without satisfying the bailee's lien for charges." The same principle prevails in Minnesota where

in *State v. Cohen,* 196 Minn. 39, 263 N.W. 922, defendant, taking a fur coat belonging to her from possession of the furrier who had lien thereon for price of alterations and repairs, was guilty of larceny. Likewise, in the State of Washington, *State v. Nelson,* 36 Wash. 126, 78 Pac. 790, (1904), wherein it was held that an information alleging defendant feloniously broke into stable with intent to take horses for whose care they owed the stable keeper, sufficiently charged the offense of burglary, notwithstanding defendant's ownership. Kansas is similarly committed to the rule as evidenced by the case of *State v. Hubbard,* 126 Kan. 129, 266 Pac. 939, (1928). Therein, in a prosecution for larceny of an automobile, an instruction that ownership of the person deprived would be sufficient if he were a pledgee was held proper.

The position taken in the instant case finds support in *32 Am. Jur., Larceny, Section 53,* wherein it is stated: "If personal property in the possession of a person other than the general owner by virtue of some special right or title is taken from him by the general owner, the taking constitutes larceny if it is done with the felonious intent of depriving such person of his rights, or of charging him with its value, and in such manner that if done by a stranger, it would be larceny. Thus, it is generally held larceny for the general owner to take his property from the possession of another who has a lien thereon, with the felonious intent of depriving such other of his lien." *52 C.J.S., Larceny, Section 39,* under the heading, "Goods in Possession of Bailee" states; "While there have been expressions to the effect that a person who takes his own property from a bailee is not guilty of larceny, according to the rule usually recognized, larceny may be committed by the owner's secret, forcible, or fraudulent taking of his property from the bailee with the felonious intent of charging the bailee with their value, or of depriving the bailee of his rights, as, for example with the intent of defeating the bailee's lien for his charges for the keeping, repairing, or transportation of the property."

Therefore, while the question presented in the principal case may be of first impression in this state, the conclusion of the

court sustaining the validity of the indictment is amply supported by the case law of our sister states, as well as by the above recognized encyclopedias.

DOMESTIC RELATIONS — DISCRETION OF THE COURT TO REDUCE OR DENY JUDGMENT FOR ACCRUED ALIMONY UNDER CPA 1171-b—Motion by petitioner for leave to enter judgment for unpaid temporary alimony pursuant to section 1171-b of the Civil Practice Act in a separation action, instituted by the wife, wherein, after a trial, the complaint was dismissed on the merits. *Held,* that the judgment requested should not be granted. The court maintained that under CPA 1171-b it had the right to exercise its discretion in the granting of this remedy, and decided that the requirements of justice dictated that respondent should not be held liable for the alimony when it had been decided that the petitioner's case had no merit. The court said that although this might place a premium on disobedience of orders to pay alimony pendente lite, it felt that this course of action was the closest to actual justice. *Walters v. Walters,* 195 Misc. 433, 90 N.Y. Supp. 2d 297 (1949).

Prior to September 1, 1939, when section 1171-b of the Civil Practice Act became effective, all claims for alimony pendente lite fell with the final judgment. *Doncourt v. Doncourt,* 245 A. D. pp. 1, 91, 281 N.Y. Supp 535, aff'd. 275 N.Y. 470. Section 1171-b, as enacted in 1939, provided that "Where the husband . . . makes default in paying any sum of money as required by the judgment or order directing the payment thereof, the court may make an order directing entry of judgment for the amount of such arrears . . . " The question then arose as to whether the courts were bound to make such an order or whether under the section they had discretion. A split in authority developed between the First Department on one hand and the Second, Third, and Fourth Departments on the other.

The courts in the First Department construed the word "may" in the statute as meaning "must," and thus the rule developed that regardless of the merits of the main action, the court was compelled to grant a judgment against the respondent for the full amount of the alimony in arrears. *Treherne-Thomas* v. *Treherne-*

Thomas, 267 App. Div. 509, 46 N. Y. Supp. 2d 679 (1st Dept. 1944). The rule developed in the Second, Third, and Fourth Departments was that the court had discretion to consider the equities in favor of the respondent in granting the remedy to the petitioner. *McCanliss v. McCanliss,* 268 App. Div. 138, 49 N. Y. Supp. 2d 289 (2d Dept., 1944); *Van Dusen* v. *Van Dusen,* 258 App. Div. 1020, 17 N. Y. Supp. 2d 96 (3rd Dept., 1940); *Gehring* v. *Gehring,* 262 App. Div. 1065, 30 N. Y. Supp. 2d 257 (4th Dept., 1941).

Apparently the judge in the present case was still thinking in terms of the split in authority when he said on page 435: "I consider section 1171-b allows the court to exercise its discretion although the prevailing opinion in the *Treherne-Thomas* case (*supra*) tends to a contrary view . . ." However, upon the recommendation of the Law Revision Commission in 1948 (see *Law Revision Commission — Report, Recommendations, and Studies, 1948,* at page 241), the Legislature amended section 1171-b to read as follows: ". . . the court *in its discretion* may make an order directing the entry of judgment for the amount of such arrears, *or for such part thereof as justice requires having regard to the circumstances of the respective parties . . .*" (additions italicized). This amendment was part of the Laws of 1948, Chapter 212. This change was recommended by the Law Revision Commission in the following language: "The Commission believes that on an application for a money judgment under section 1171-b, the court should have discretion to extinguish part or all of the accrued alimony where circumstances make it equitable . . ." (page 242 of the report cited *supra*). Thus, it appears that the amendment to section 1171-b resolves the split of authority between the various departments of the Appellate Division, and that this court had discretion under the express wording of the statute at the time it rendered this decision.

FOREIGN CORPORATIONS—CAPACITY TO SUE IN FEDERAL COURTS—On June 20, 1949, the Supreme Court of the United States reinstated the order of the district court of Mississippi in dismissing the complaint of the Interstate Realty

Company for a want of jurisdiction. The plaintiff was a corporation organized under the laws of Tennessee. For many years prior to this suit it had been doing business as a real estate broker in the state of Mississippi. The defendant Woods was a resident of Mississippi and had contracted with the plaintiff corporation to sell some real estate belonging to the defendant in Mississippi. After the property was sold, Woods refused to pay the commission. In the ensuing action the defendant challenged the standing of the plaintiff in Federal Court on the ground that it had neglected to take out a certificate to do business in Mississippi and therefore it could not prosecute any action in this Federal Court on a cause of action arising out of business done in the state. *Interstate Realty Company* v. *Woods,* 337 U. S. 535 (1949).

The District Court dismissed the complaint on the basis of the decision in the case of *Erie Railroad* v. *Tompkins,* 304 U. S. 64 (1938). "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its legislature in statute or by its highest court in a decision is not a matter of federal concern. There is no general common law." (*Id at 78.*)

On appeal to the Court of Appeals, the dismissal by the lower court was reversed. It was held there that in applying the state decisional law of Mississippi the District Court erred; the law there was that actions, by the foreign corporation under these circumstances, were barred in the courts of the state only, and since diversity of citizenship was the basis for federal jurisdiction, the state courts were powerless to limit the federal courts in matters of procedure.

The case of *David Lupton's Sons Company* v. *Automobile Club of America,* 225 U. S. 489 (1912), was the pillar of the Circuit Court's ruling. In that case, a Pennsylvania Corporation was denied access to the courts of New York State because of its failure to obtain a certificate to do business in that state. The corporation was able to bring a suit in the Federal Court as "The state could not prescribe the qualifications of suitors in the courts of the United States."

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The case of *Angel* v. *Bullington,* 330 U. S. 183 (1947) apparently overruled the *Lupton* case. Bullington, a Virginia citizen sold land in Virginia to Angel, a citizen of North Carolina. After obtaining a deficiency judgment against Angel, in Virginia, Bullington sought to enforce it in North Carolina. A statute in that state barred this type of action. Bullington then brought a suit in the Federal court. The Supreme Court held that the decision in the state court was *res judicata* as to the constitutionality of the North Carolina statute, and that it could not be litigated again, and furthermore a federal court could not entertain a suit based on diversity of citizenship where it was barred by a statute in the courts of that state.

The Circuit Court in the principal case held that the *Bullington* case was decided on *res judicata* only, and applied the rule of the *Lupton's* case.

The defendant appealed this decision of the Circuit Court and in view of the *Bullington* case, the Supreme Court granted certiorari.

Mr. Justice Douglas writing for the majority held that the decision in the case of *Erie Railroad* v. *Tompkins, supra,* controlled and that the plaintiff in the instant case was barred in the Federal courts the same as he was in the state courts.

Erie Railroad v. *Tompkins, supra,* overruled *Swift* v. *Tyson,* 16 Pet. 1 (1842) that had stood for many years. The court felt in the *Erie* case that to do justice to Section 34 of the Federal Judiciary Act the federal courts must follow the substantive law of the state in diversity of citizenship cases as laid down in state decisions.

A strong dissent in the instant case was made by Mr. Justice Jackson. He contended that the rule of the *Erie* case was being incorrectly applied. The purpose of the state statute in Mississippi was to penalize those corporations that denied revenue to the state by their failure to take out a license and that, therefore, the statute was clearly meant as a prohibition by the state of Mississippi to the use of its courts only.

The result of the decision is that in diversity of citizenship cases, the federal court is but another state court. One would think that the incapacity of the Interstate Realty Company to pursue its action in the courts of Mississippi was a procedural limitation only. If it were a matter of procedure then the rule in the *Erie* case would not apply. Clearly the Congress and not the state determines the rules of federal procedure. Therefore, in order to apply the rule advanced by the case of *Erie Railroad* v. *Tompkins, supra,* the incapacity of the plaintiff must rest on the substantive law.

The law of Mississippi is that a cause of action arising out of facts similar to the instant case is merely unenforceable in the courts of the state and not void. Miss. Code 1942, § 5319. It It would, therefore, seem that the Circuit Court of Appeals was correct in sustaining the action.

But be this as it may, the Supreme Court has not declared that actions in federal courts brought there on a basis of diversity of citizenship are to be governed by the state law and that in such actions the federal court will be considered to be but another state court. When the federal court is treated as another state court we care not about a distinction between procedural and substantive law and the above problem is removed.

Assuming that Woods, the defendant, was served in Tennessee, where the plaintiff Interstate Realty Company was incorporated, and then moved for removal to the Federal Court of the district of Tennessee, what would be the result? The Federal District Court would apply the law of Tennessee. Tennessee in such an action no doubt would apply by virtue of its conflict of laws doctrine, the law of Mississippi where the contract was made. Mississippi's decisional law being that its courts are closed only, not that there is no cause of action, a federal court sitting in Tennessee would be able to entertain the action.

In view of this decision, it is seen that a federal court in Tennessee may entertain an action which a federal court in Mississippi may not. To all appearances this is an anamolous situation resulting from the failure of the Supreme Court of the

United States to restrict the decision in the case of *Erie Railroad* v. *Tompkins, supra,* to the facts which gave it life—the substantive law of the state.

FRAUDULENT CONVEYANCES—WIFE AS A CREDITOR—CONSTRUCTIVE TRUSTS—Plaintiff placed property in the name of defendant, his minor nephew, who was in the armed forces, by deed recorded in June 1945. At the time, plaintiff's wife was attempting to obtain support from him in the Domestic Relations Court of New York City. Defendant reached his majority in September, 1946 and in January 1947, plaintiff claims to have had a conversation with him during which he demanded a reconveyance of the property in accordance with their alleged agreement that it was to be returned to plaintiff after defendant reached twenty-one. Defendant denies such conversation or agreement, and testifies that he did not know that the property was in his name until he was so informed by a letter from his mother sometime in 1945. Defendant refuses to reconvey, and plaintiff brings suit in equity praying that defendant be adjudged to hold as trustee for him, and be ordered to reconvey to him. *Held,* that although defendant paid no consideration, the transfer was made by plaintiff to conceal his assets from his wife in her action, and equity will not now assist him: *Bascombe v. Sargent,* 195 Misc. 328 (Supreme Ct. Queens County 1949).

The decision of the court is mainly based on the rule of equity that "No court will lend its aid to a man who founds his cause of action on an immoral or illegal act," *Holman v. Johnson* 1 Cowp. 341, 343, 98 Eng. Rep. 1120, 1121 (1775) which is commonly referred to as the "clean hands" doctrine and is frequently applied in the field of fraudulent conveyances.

As authority for the application of this rule, the court cites *Pierce* v. *Pierce,* 253 App. Div. 445, 2 N. Y. Supp. 2d 641, aff'd 280 N. Y. 562, 20 N. E. 2d 15 (1938), *Sorrentino* v. *Sorrentino,* 75 N.Y.Supp. 2d 813, aff'd without op. 272 App. Div. 1067 (1947); and *Kalman* v. *Kalman,* 275 App. Div. 715 (1949), which cases the court recognizes as applying the rule in the case of conveyances attempting to defeat the rights of creditors.

Citing *DeBrauwere v. DeBrauwere,* 203 N. Y. 460, 96 N. E. 722 (1911) for the rule that a husband is under a legal obligation to support his wife, the court attempts to place the wife on the same basis as a creditor saying:

> "The conduct of plaintiff in concealing his assets for the purpose of escaping the enforcement of his obligation to support his wife is as much contrary to good morals, sound public policy, and the spirit and letter of our laws as is the concealment of assets of a debtor for the purpose of defeating the just claims of his creditors; neither is entitled to the aid of a court of equity."

There is ample authority for the proposition that equity will not enforce a constructive trust for, or order a reconveyance to, a transferor who originally made the conveyance for a fraudulent purpose, *Robinson v. Stewart,* 10 N. Y. 189 (1854); *O'Brien v. O'Brien,* 188 App. Div. 309, 177 N. Y. Supp. 25 (1919); and *Simis v. Simis,* 146 App. Div. 655, 131 N. Y. Supp. 460 (1911); but its application in the case of a conveyance made to deprive a wife of support in the absence of any evidence of divorce, seperation, or abandonment is not to be found among the New York cases.

It seems well settled that "A conveyance made by a husband in *anticipation* of his wife's libel for divorce and to prevent her from recovering alimony is fraudulent and may be set aside at her petition," 19 C.J. 734 (citing many cases) and it would seem proper to refuse a reconveyance to the husband's petition in such a case. The rule should be the same in the case of a conveyance by a prospective husband to deprive his bride to be of her statutory share in his property, *LeStrange v. LeStrange,* 242 App. Div. 74, 273 N. Y. Supp. 21 (1934). The tendency indicated by these decisions seems to be to recognize the wife as occupying a position similar to that of a creditor in certain situations, and in *Enthoven* v. *Enthoven,* 167 Misc. 686, 4 N. Y. Supp. 2d 514 (1938) aff'd. without op. 256 App. Div. 813 (1938), a wife receiving payments from her husband under a separation agreement was held to be his creditor within the meaning of the Debtor and Creditor Law sec. 270 which defines a creditor as "A

person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent." The court in that case ordered the husband's transfer of a fund kept on deposit for the monthly payments set aside, even though the wife's claims had not matured.

Direct authority for the proposition that a wife can be a creditor prior to the institution of any suit is found *Bouslough v. Bouslough,* 68 Pa. 495 (1871) and *Armstrong v. Armstrong,* 299 Pa. 51, 149 Atl. 87 (1930) which regard the wife as a "quasi creditor." The court in the *Armstrong* case quotes the *Bouslough* case as saying:

> "There is no reason why a wife whose husband has deserted her and refused to perform the duty of maintenance or by cruel treatment has compelled her to leave his house and commence proceedings for divorce and maintenance should not be viewed as a quasi creditor in relation to the alimony which the law awards to her. So long as she is receiving maintenance, and is under his wing as it were, she is bound by his acts as to his personal estate; but when she is compelled to become a suitor for her rights, her relation become adverse and that of a creditor in fact, and she is not to be balked of her dues by his fraud. It is argued that a wife cannot be a creditor until a decree is made for alimony. But why is her case before the decree not as much within the spirit and intent of the statute (Pennsylvania Debtor & Creditor Law) as that of a subsequent creditor who was intended to be affected by a deed made before his debt was contracted but in view of it."

This reasoning is of the same nature as that employed so briefly in the principal case and would seem to apply equally well in New York not only to the future creditors referred to by this statement; but to present creditors as well. There being no apparent reason why a wife seeking support from her husband prior to any action for divorce, annulment, or separation should not be included within this language, if the question is presented to the higher courts in this state, it is reasonable to expect that they would so hold.

In an action between a creditor and the transferee to have a conveyance, made to hinder, delay, or defraud creditors, set aside, the creditor should always prevail, for the very existence of the legal action is evidence of such hinderance and delay. In an action between the transferor and transferee however, this reasoning does not necessarily apply, and it would seem that the "clean hands" doctrine should not be applied to defeat the transferor unless actual hinderance or delay can be proved. This reasoning indicates that on the facts reported in the principal case, the plaintiff could have escaped application of the "clean hands" doctrine.

Section 273 of the N. Y. Debtor & Creditor Law provides that conveyances made without fair consideration by a person who will be rendered insolvent thereby are fraudulent as to creditors. Although proof of the absence of fraudulent intent will not enable the transferee to defeat the suit of a creditor to have such conveyance set aside, proof of the solvency of the debtor-transferor will, *Feist* v. *Druckerman,* 70 Fed. 2d 333 (C.C.A. 2d 1934) This rule does not seem to apply under Section 276 N. Y. Debtor & Creditor Law which provides that conveyances made with actual intent to hinder, delay, or defraud creditors are fraudulent as to such creditors, *Scholtz v. Yastrzemski,* 247 App. Div. 823, 286 N. Y. Supp. 694 (1936); but as between the parties in the principal case, there is no apparent reason why proof of the transferor's continuing solvency and failure to delay or hinder recovery by the wife would not overcome the burden placed upon him by his original fraudulent intent. Such result is supported by the fact that it is not the function of a court of equity to punish an attempted wrong by enforcing a forfeiture of property which is in effect what the court in this case has done. In addition it may be observed that in this case by denying recovery to the plaintiff, the court may well be enabling him to accomplish, as to any future attempt by his wife to obtain support, that which he supposedly sought to accomplish by the original conveyance. Further supporting this result is the case of *Tiedemann v. Tiedemann,* 201 App. Div. 614, 194 N. Y. Supp. 782, (1922), aff'd 236 N. Y. 534, 142 N.E. 273 (1923). There a party in anticipation of a damage suit arising out of a collision transferred

real property to his wife with an agreement to reconvey; but retained valuable assets in his own name. The expected litigation never arose and the court sustained the transferor's suit to set aside the conveyance of his wife to a third person. These considerations indicate the inherent inadequacies of the application of the "clean hands" doctrine in denying reconveyance to a transferor because of his fraud on a third party.

An additional point to be noted in the principal case is the absence of any comment by the court on the basic conflict between the theory of the complaint and that of the decision. Plaintiff's prayer was that "Defendant be adjudged to have purchased and to now hold" the property "as trustee for the benefit of plaintiff and that he execute and deliver to the plaintiff a conveyance of said premises." The foundation of this prayer is the theory of constructive trust which is based upon the equitable doctrine of unjust enrichment. Constructive trust is defined as; "The formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee" *Beatty* v. *Guggenheim Exploration Co.,* 225 N. Y. 386, 122 N. E. 378, (1919). The constructive trust is to the express trust what the quasi contract is to the contract, both being imposed not because of the intention of the parties as is the case with express trusts and contracts; but rather to prevent unjust enrichment, Scott on Trusts, Section 462.1. *"See, e. g.," Sinclair v. Purdy* 235 N. Y. 245, 139 N. E. 255 (1923).

In direct conflict with the constructive device is the "clean hands" doctrine which denies reconveyance when the original transfer was made with a fraudulent purpose. It too is a creation of courts of equity, the nature of which is best illustrated by the language employed in *Holman v. Johnson,* supra, "If from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa,* or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such plaintiffs."

This reasoning is of an entirely negative nature, and it is submitted that consideration of the unjust enrichment which is brought about in cases where the rule is applied might well make the courts more reluctant to enforce it than they seem to be at present. As pointed out above, the rule actually enforces a forfeiture which in itself seems inconsistent with the nature of equity, particularly, where, as in the principal case, there is no consideration given for the original transfer, which from one standpoint at least places the equities on the side of the transferor. In this case, further reason supporting a reconveyance is found in the possibility of future accomplishment of the original fraudulent purpose by denying relief, and there certainly seems to be justification for belief that had these points been properly brought to the attention of the court a different decision could have been reached.

In any event, analysis of the basic conflict between the theories of unjust enrichment and "clean hands" which is presented by this class of cases, and a subsequent weighing of the equities of the parties actually involved would result in decisions better supported by principle and precedent, although not necessarily different in final result.

MORTGAGES — LIMITATION OF ACTIONS — FORECLOSURE FOR INTEREST WHEN PRINCIPAL IS BARRED Plaintiff sues in April, 1949 to foreclose a mortgage executed November, 1931, and which would expire by its terms April 15, 1934 . Plaintiff alleges that he could not bring suit on the mortgage as he is suing for principal only and under CPA section 1077 (g) (mortgage moratorium statute) he could not bring suit until the expiration of the emergency period, July 1, 1947 in this case.

Defendant admits default on principal and interest payments in December, 1932, but pleads the statute of limitations (CPA section 47-a) as his defense. Defendant also counterclaims under section 500, (4) of the Real Property Law to have the mortgage record cancelled.

Held: The statute of limitations is a valid defense to a foreclosure action for the principal, but not to the action for the interest. Consequently, the mortgage cannot be cancelled. *Radish* v. *Schulman,* 91 N. Y. Supp. 2d 459 (1949).

The court held that CPA sections 1077 (a-g) do not apply where there is a default of *interest* payments. Sections 1077 (a-g) apply only to principal defaults. The whole mortgage may be foreclosed. *Rookery Investing. Co.* v. *Audley Construction Corp.,* 188 Misc. 693, 67 N. Y. Supp. 2nd 875 (1947); *Egan* v. *Carroll-Garfield Corp.,* 185 Misc. 530, 58 N. Y. Supp. 2nd 774 (1945), affirmed 269 App. Div. 998 (1945).

The original mortgage, under seal, fell within the twenty year limitation statute. The period would therefore have run to 1954. However, section 47-a of the CPA was added under chapter 499 of the laws of 1938, and this section shortened the twenty year limitation on mortgages and bonds to six years. As there were more than six years remaining to run on this mortgage in 1938, the new limit of six years was imposed and the mortgage was barred September 1, 1944. *Chapin* v. *Posner,* 299 N. Y. 31 (1949).

Plaintiff's action to foreclose on the principal is barred but he can foreclose the mortgage for the interest which accrued for six years prior to this suit, but only up to the day the principal was barred, in this case, two years and five months (April, 1942 to September 1, 1944).

The holding of the principal case seems to be consonant with other recent decisions establishing the rule that a mortgage barred by limitations as to a recovery for the principal, may yet be foreclosed for interest which accrued six years prior to the institution of the suit, but only up to the date the principal is barred. *Jackson Heights Ap't Corp.* v. *Staats,* 272 App. Div. 780 (1947); *Ernst* v. *Schanck,* 271 App. Div. 1012 (1947), affirmed 297 N. Y. 566, 74 N. E. 2d 482 (1947); *Chapin* v. *Posner, supra.*

This rule is an outgrowth of the moratorium statute. The Legislature, by the moratorium statutes, intended to separate the cause of action for foreclosure on the principal from the cause of action for foreclosure for interest; the purpose of the legislation

being to prevent foreclosure as long as interest was paid. *Union Trust Co. of Rochester* v. *Kaplan,* 249 App. Div. 280, 292 N. Y. Supp. 152 (1936).

This rule is peculiar to mortgages alone, and will probably not be extended to other forms of indebtedness. The prevailing rule in other debt situations is that the limitations begin to run on interest and principal after default of the principal. Both are then barred together. In *Re Diven,* 115 Kan. 119, 36 ALR 1081 (1924) holds that " . . . interest, always an incident of the debt, is deemed payable with the principal, and is barred with it." *Scott* v. *Sloan,* 3 Tex. Civ. App. 302, 23 S. W. 42 (1893) holds that " . . . on a contract to pay interest, . . . limitations on interest run from the maturity of the principal debt.

WILLS—AFTERBORN CHILD—SURVIVING SPOUSE'S RIGHT OF ELECTION—ABATEMENT—Testator died leaving a wife, collateral relatives, and a son born after the execution of his will which left one-half of his estate to the widow, and one-half equally to two brothers, a sister, and a nephew, all of whom survived testator. The widow was aware that the child was entitled to his share as in intestacy *Decedent Estate Law, Sections 26, 83.* She, therefore, filed her election against the will in accordance with Decedent Estate Law Section 18. *Held,* that the widow had a general right of election even though she was left more than her statutory share by the will since she would receive only one-sixth of the estate after the pretermitted child was provided for according to the statutory requirements. This resulted in a division of one-third for the widow, eight-fifteenths for the pretermitted child, and two-fifteenths for the other beneficiaries under the will. *Matter of Vicedomini,* 195 Misc. 1057 (Surrogate's Ct., Kings County, 1949).

The court refused to follow a suggested division of two-thirds to the child, one-third to the widow, and nothing for the other beneficiaries on the ground that it would ignore Decedent Estate Law Section 18 (2) which provides, "Where any such election shall have been made, the will shall be valid as to the residue remaining after the elective share provided for in this section has been deducted and the terms of the will shall as far as possible

remain valid." Another method of division rejected by the court was two-thirds to the child, one-sixth to the widow, and one-sixth to the other beneficiaries which it was said "would do violence to the spirit and intent of Decedent Estate Law Section 18."

Decedent Estate Law Section 26 provides that the share of afterborn children shall be made up by ratable contributions from all devisees and legatees. Admitting that strict interpretation of Section 26 might support the view that the widow should receive no right of election, the court prefers to regard the child as a "statutory legatee" receiving his share under the will. Following this process of reasoning, the court compels contribution from the child's intestate share to make up the difference between the widow's share under the will, and her minimum statutory share.

The court properly distinguishes *Matter of Wurmbrand,* 194 Misc. 203, 86 N. Y. Supp. 2d 705 (1949), on the ground that the question of who should contribute to make up the widow's share was not considered in that case. The argument in the *Wurmbrand* case was confined to the compliance of the widow with the filing requirements of Decedent Estate Law Section 18, and her right to make an election. It was decided that there was compliance with the filing provisions, and that she did have a right to election even though she received more than her statutory share by the will. In this latter respect both cases are in accord.

There is no specific provision in the Decedent Estate Law as to whether a surviving spouse who is given more than her statutory share by will has a general right of election; but it seems to be established as a general proposition that there is no right of election in such cases, *Matter of Clark,* 275 N. Y. 1, 9 N.E. 2d 753 (1937). However it has also been held that the statute shall be liberally construed to enlarge the property rights of a surviving spouse, *Matter of Byrnes,* 260 N.Y. 465, 472, 474, 184 N.E. 56 (1933); *Matter of Epstein,* 176 Misc. 494, 498, 27 N.Y. Supp. 2d 872 (1941), and it seems proper therefore to allow the surviving spouse to elect to take against the will when her share has been reduced to less than the statutory minimum by some factor outside the will, as happened in the *Vicedomini* case.

One difference between Decedent Estate Law Sections 18 and 26 is that in Section 26, providing for the share of afterborn children, it is provided that the share of the child shall be deducted proportionately from the devisees and legatees under the will. This provision is omitted from Section 18; but it has been established by the cases that the share of the surviving spouse shall be made up in a like manner. *Matter of Goldsmith,* 175 Misc. 757, 25 N.Y. Supp. 2d 419 (1949); *In re Finkelstein's Estate,* 189 Misc. 180, 70 N. Y. Supp. 2d 596 (1947; *In re Curley's Estate,* 160 Misc. 844, 290 N.Y. Supp. 822 (1936). There is no support for the proposition that the rights of the surviving spouse under the statute are inferior to those of an afterborn child. Specific provision is made in the statute for the protection of these two classes, and there is no such provision for the protection of other legatees except that of Decedent Estate Law Section 18 (2), providing that the will shall remain valid as far as possible after the wife has exercised her right of election. Reading the statute as a whole however, it is apparent that this latter provision is not intended to detract in any way from the rights of a surviving spouse, or afterborn child, and there does not seem to be any firm basis upon which the *Vicedomini* case can stand. It, in effect, prefers the rights of either the surviving spouse or the other beneficiaries to those of an afterborn child.

It is said by the court that the intention of the testator and the provisions of Decedent Estate Law Section 18 (2) would be disregarded by excluding the other beneficiaries; but it is submitted that the statute is not to be interpreted in relation to the intention of the testator. It should rather be interpreted with reference to the intent of the legislature which was to benefit and enlarge the rights of the surviving spouse and afterborn children. In addition, the court is actually faced with a situation which the testator is presumed by the statute not to have foreseen. It is therefore not accurate to say that he intended the collateral beneficiaries to receive part of his estate under the will when there is no evidence of an intent to disinherit the afterborn child. The tacit assumption upon which Section 26 is based is that, had the testator foreseen the possibility of additional children he would have provided for them and, proceeding on this basis, the legis-

lature has provided in mandatory terms for the protection of such children. It is clear that it is not within the purview of the courts to ignore the provisions of the statute.

A further demonstration of the weakness of the theory of the *Vicedomini* case appears where the testator dies survived only by a pretermitted child, and by his will leaves his entire estate to strangers. In that case, the will, in effect, is completely void, and the child takes the entire estate to the exclusion of the other beneficiaries, *Smith* v. *Robertson,* 89 N. Y. 556 (1882). Any other distribution of the estate in such a case would be entirely arbitrary and clearly contrary to the intention of Section 26 of the Decedent Estate Law.

The court cites *Rockwell v. Geery,* 4 Hun. 606, 6 T & C 687 (1875): *Yung v. Blake,* 163 App. Div. 501, 148 N. Y. Supp. 557 (1914); and *Mitchell v. Blaine,* 5 Paige 588 (1836), as the only comparable cases under Decedent Estate Law Section 26. There is no further mention of them except to cite the *Mitchell* case as standing for the proposition that all legatees, including a widow, shall contribute ratably to make up the share of the afterborn child. Although the court does not so state, it may be surmised that it derived the designation of the afterborn child as "statutory legatee" from the *Rockwell* case, but it is used in the *Rockwell* case in an entirely different situation and for an entirely different purpose than that encountered in the *Vicedomini* case. In the former case the testator died leaving a will dividing his state equally among his seven children. A child was born after the execution of the will and the controversy is concerned with whose share shall be charged with the satisfaction of testator's creditors. The beneficiaries under the will contended that the rule should be that no recovery should be had against devisees until the creditor has exhausted his remedy against the heirs; and therefore the statutory share of the afterborn child should be charged first; but the court held that the afterborn child although taking by operation of law would be regarded as a "statutory legatee," and the shares of all the children would be diminished equally to satisfy the creditors. The reason given for this conclusion was that if the share of the afterborn child was made available first and thereby exhausted, the purpose of the statute

providing for her share in the first place would be thwarted. It is clear that this is an entirely different type of problem than that encountered in the *Vicedomini* case, and it is suggested that the rule of the *Rockwell* case has no application except to *protect and enlarge* the interests of the afterborn child.

The conclusion seems unavoidable that although the *Vicedomini* case is well supported in regard to allowing the widow her right of election, there is no support for the conclusion that the share of the afterborn child must contribute to make up the widow's share.

WORKMEN'S COMPENSATION LAW—LIBERAL CONSTRUCTION—TIME LIMIT ON ACTION FOR DEATH FROM SILICOSIS—Decedent was exposed to harmful dust while working for the defendant employer. On November 15, 1940, during the course of his employment, decedent became totally disabled as a result of silicosis and continuously remained so until his death on December 31, 1945. His death was causally related to his silicotic condition. His widow claimed damages for his death under section 67 of the Workmen's Compensation Law. This section was repealed by the Laws of 1947, Chapter 431, Section 14, but all rights which accrued under the old law were preserved. The old section 67 read: "An employer shall be liable for the payments prescribed by this article for silicosis or other dust disease when disability of an employee resulting in loss of earnings shall be due to an employment in a hazardous occupation in which he was employed, and such disability results within one year after the last injurious exposure in such employment; *or, in case of death resulting from such exposure, if such death occurs within five years following continuous disability from such disease.*" *Held,* that the statute should be so construed as allowing the claim of the widow in this case. The court rejected the argument that the statute meant that death must occur within five years from the inception of total disability. The court said that it was required to construe this remedial statute liberally, and that, in its opinion, depriving this claimant of a cause of action because her husband lived five years, one month, and ten days from the inception date of total disability,

instead of less than five years, was against its sense of justice. The court also said that if the Legislature had wished to make such a discrimination, it would have used language so definite that its intent could not be misunderstood. *Matter of Nigohosian* v. *Daub & Company et al.,* 275 App. Div. 463, 90 N. Y. Supp. 2d 562 (1949).

In giving this liberal construction to the statute, the Appellate Division followed the rule laid down in a series of New York cases that the Workmen's Compensation Law was a remedial statute and should be liberally construed so as to give effect to its beneficent purposes. *Delinousha* v. *National Biscuit Co.,* 248 N. Y. 93, 161 N. E. 431 (1928); *Commissioner of Taxation and Finance* v. *Nu-Art Advertising Company,* 271 N. Y. 112, 2 N. E. 2d 280, 104 A. L. R. 1209 (1936); *McQueeney* v. *Sutpher & Hyer,* 167 App. Div. 528, 153 N. Y. Supp. 554 (1915); aff'd. 217 N. Y. 627, 111 N. E. 1092 (1915); *Dilg* v. *Pyrene Mfg. Co.,* 239 App. Div. 90, 266 N. Y. Supp. 593, aff'd. 264 N. Y. 505, 191 N. E. 537 (1933); *Jones* v. *Herbert Equities,* 186 Misc. 163, 60 N. Y. Supp. 2d. 88 (1946).

In *DiDonato* v. *Rosenberg,* 263 N. Y. 486, 189 N. E. 560 (1934), the Court of Appeals had placed a limitation on this doctrine of liberal construction by saying: "While the Workmen's Compensation Law is to be liberally construed to serve the social need underlying it, it may not be stretched beyond the limits established by the Legislature, even in cases of hardship." This rule was not mentioned by the court in the case under consideration, so it's a justifiable assumption that it was deemed inapplicable. However, the interpretation given the statute in this case seems to depend a great deal for its justification on the hardship involved, and comes very close to the limitation of the *DiDonato* case.

The court did not set the time from which the five year limitation specified in the statute should be computed. Probably the main reason for this indefiniteness was the fact that the Laws of 1947, Chapter 431, specified in section 14 that as of July 1, 1947, section 67 of the Workmen's Compensation Law was repealed, and in section 10 said that section 44-a was to be in-

serted. The new section 44-a provides: "The employer in whose employment an employee was last exposed to an injurious dust hazard shall be liable for the payments required by this chapter when disability or death of the employee shall be due to silicosis or other dust disease. Notwithstanding the provisions of section forty of this chapter the employer shall be liable for the payments prescribed by this chapter when such disability results within two years after the last injurious exposure as defined in section forty-seven, *or when death results at any time from such injurious exposure.*" Approving Chapter 431 of the Laws of 1947 on March 25, 1947, the Governor stated in his memorandum that one of the effects of this new section 44-a was to remove the present five year limitation in death cases. In view of this, the court in the present case probably saw no need or justification for a definite and binding commitment designating a point from which the five year period should be computed.

Recent Books

THE NEWSPAPER. By Ignaz Rothenberg. New York: Staples Press Inc., 1948, Pp. xvi, 351.

Between the Maryland constitution's concept that "the liberty of the press shall forever remain inviolate," and the personal direction of the "Volkisher Beobachter" by Hitler, stretches a tortuous path, fraught with imponderable considerations. Freedom of the press must be reconciled with freedom from the press. National security must be balanced against the free flow of information. Reflection of public opinion must be distinguished from its manufacture. While these problems may never be resolved to the satisfaction of all interested parties, the author seeks to clarify the issues involved by exploring the fundamental causes of governmental regulation, and the effect of experimentation in that field in Europe and the Americas.

The privilege or right of press anonymity, of current interest in New York, is carefully scrutinized in the first section of the book. No new problem, the scope of immunity (in democratic countries, of course) ranges from Switzerland's Federal Law of 1853 which guarantees anonymity in all except treason cases, to the British Official Secrets Act of 1889 which, until 1938, specifically required disclosure of sources of published news to competent authority. Attempts to draw the line between these two extremes have generally resulted in dissatisfaction on the part of both the press and its critics.

A most vexatious problem for authorities in late years has been the fixing of responsibility for the contents of a newspaper. This question was of lesser importance in the early development of the newspaper business, as usually not more than three or four persons were connected with the enterprise. Owner, editor, author, and printer were all liable to punishment for a criminal offense, and usually one of them was available to absorb the

punishment. As corporate bodies replaced individual proprietors, and the payroll of the paper multiplied, it became increasingly difficult to ascertain the true responsible party. Most of the civil law countries, following the lead of France, have attempted to solve the problem by creating a scapegoat—the "gerant"—to take the place of editor, publisher, or author, and assume responsibility for the entire contents of the publication. Unlike in Anglo-Saxon countries, where responsibility must be born by all who cooperate in the publication of the libel, the Belgian system calls to account only the author. The editor and publisher, who dictate the policy of the newspaper are prosecuted only if the author is unknown, or not a resident of Belgium.

In one of the major portions of his work, Dr. Rothenberg points out the basic differences in the law of libel. From the Anglo-Saxon viewpoint, libel is essentially a civil action, and the amount of damages seems to increase with the stability of the society. Damages for a comparable offense seem to be much higher in England than in America, while in the United States the East places a greater value on privacy and reputation than does the West. In civil law countries the remnants of chivalry have been carried into the concept of libel. The belief that money damages can recompense an insult was repugnant to the theory that life itself must be staked to preserve honor. Now a criminal proceeding has taken the place of the time honored duel.

Except for the more obvious forms of censorship, knowledge of journalistic regulations of foreign countries is not widespread. THE NEWSPAPER can prove a considerable aid to legislators, who every few years are called upon to consider revision of existing press law.

SOVIET CIVIL LAW. Two volumes. Volume II. By Vladimir Gsovski. With a foreword by Hessel Yntena. Ann Arbor: Univ. of Michigan Press, 1948. Pp. xxxviii, 909.

In volume II of SOVIET CIVIL LAW, the chief of the Foreign Law Section of the Library of Congress presents the first compendium of Soviet statutes whose compilation has been guided

by the spirit of analysis rather than the political philosophies of the author. Included in this exhaustive collection of statutes, edicts, and administrative decisions are the Soviet Civil Code, Code of Domestic Relations, Soviet Judiciary Act, Code of Civil Procedure, and statutes on nationality, corporations, patents, copyrights, collective farms, and labor. The terse comments of the author which follow and explain each section provide the proper social and economic context, without which many apparent incongruities of Soviet law could not be resolved.

The basic principle which permeates the entire Soviet structure, and which is so repugnant to western ideas of individualism, is stated, appropriately enough in Section I of the Civil Code. "The law protects private rights except as they are exercised in contradiction to their social and economic purpose." After noting this all-important reservation, the Civil Code goes on to establish the citizens' rights, duties, and liabilities in contract, tort, agency, partnership, suretyship, insurance, and inheritance, borrowing most of its provisions from the Napoleonic and Germanic codes, with variations due to regional peculiarities.

The Code of Marriage, Family, and Guardianship has undergone many revisions as the communistic attitude toward the institution of marriage has changed over the course of years. The code provides rules for the registration of marriages, grounds and procedure for divorce, rules for adoption, and the rights and duties connected with guardianship. Since in numerous instances the state assumes the responsibilities and privileges of the filial relationship, the portion of the code dealing with guardianship is extremely detailed, and the position of the state jealously guarded.

Soviet agrarian legislation represents one of the most marked departures from the orthodox concept of property law. An official Standard Charter for a collective farm is set out which details the rights and responsibilities of its personnel from commisar to kulak. An examination of the provisions for land tenure suggests that Soviet land policy is basically feudalistic in nature.

A curious situation arises under legislation dealing with the civil status of religion. By an early edict, ecclesiastical societies were denied rights as legal entities. A measure of religious tolerance was purportedly granted by the 1945 statute on "The Administration of the Russian Orthodox Church." However, as this statute was never published, except in parochial circles, and contains no clause indicating official approval, it has no binding force upon Soviet officialdom, although obviously it could not have been adopted without its approbation. Thus the original intemperate edict can not be said to have been repealed, and the measure of tolerance gained in 1945 is at best tenuous.

The Judiciary Act of 1938, the basis for jurisdiction of every court of the U. S. S. R., provides for the election of members of the courts of general, original jurisdiction (the Peoples' Court) ". . . in accordance with a statute to be passed hereafter." The Supreme Soviet has conveniently refrained from the passage of the supplementary statute.

SOVIET CIVIL LAW provides an invaluable insight into the way of life of two hundred million people who are living a vast social experiment. It quietly points up the insurmountable obstacles in the path of communism. A peoples' democracy has turned into an authoritorian despotism. A bureaucratic and military caste has arisen in a classless society. Religion, " . . . the opiate of the people," is gaining influence steadily. Grounds for divorce, more strict than in many American states, has transformed the basis of marriage from factual cohabitation to a legal union. The right of private property has been abolished, but land tenure is being restored. Fervent nationalism has replaced the internationale. These inescapable conclusions belie the current opinion of the inevitability of the clash between East and West. Rather, they suggest an ultimate Soviet retrogression from the communistic ideal, and at least a compromise with capitalism. While Mr. Gsovski has maintained an objective viewpoint, his work will of necessity promote this understanding, and would have provoked from Marx a plaintive, "Comrade, whither drifts the revolution?"

THE LAW OF REAL PROPERTY. Five volumes. Volume I. By Richard R. Powell. New York: Matthew Bender & Co., 1949. Pp. xiii, 792.

This is a very ambitious undertaking by Mr. Powell, an author well known to the legal profession, especially for his work as Reporter on Real Property for the American Law Institute. At the time of this writing, one volume of the five volume work has been received.

Mr. Powell plans to bring together all the essential phases of the subject of real property from all forty-eight states and the District of Columbia. He states that emphasis is to be placed on recent legislation and case law and this has been accomplished in this volume. Historical background, where necessary to a complete and full understanding of certain present problems, is adequately given.

In the first volume, the author has presented Part 1 and Part II of his work. Part I, which is the introduction, contains five chapters primarily concerned with the origin and evolution of real property law in the United States. Most notable of the introductory chapters is the fourth, "Sources of American Law," which deals with the property law of each state separately, and explains in part the diversity in the background of the states. This chapter appears to be unique in so presenting this material.

Part II is entitled "Capacity to Hold and Deal with Interests in Land" and, in five chapters, considers this aspect extensively by describing the capacity of natural persons, unincorporated groups of natural persons, private corporations, fiduciaries, and government instumentalities to hold real property in the light of the most recent developments. The author has presented this topic in a practical manner, it is thought, rather than in piecemeal way. The chapters present a full coverage for most purposes.

The four volumes yet to be received will contain the four other parts of this series. Part III will concern permissible interests in land, Part IV will deal with the relations between the owners of those interests, and Part V will discuss the relationships of the

owner to the community. Acquisition and transfer of interests will be the subject in the sixth and last part.

It is felt that this work will be well received by lawyers and law students. Not only is the series the most up to date on the subject, but also it is extremely well presented. The physical makeup of the volume lends itself to very easy reading, with well noted paragraph headings, and a complete index which allows one to find the precise topic in point with no difficulty. The author has done a remarkable job in the rapid compilation of the work that goes far to giving it present practical value.

THE FEDERALISTS, By Leonard D. White. New York: MacMillan Company. 1948. Pp. xii, 538.

The subtitle, A Study in Administrativte History, well describes the subject of this book. More particularly, the author writes about the Federalist era of 1789 to 1801 and brings the principal actors under a close but relatively impartial scrutiny. Many of us have had a certain amount of exposure to this history, not a new subject for a book, but few works have been presented in such a clever and entertaining manner so that everyone who should understand this background can scarcely afford to overlook this book.

Mr. White has done a large amount of original research to compile these forty chapters. In the first two chapters, he describes the fact that the Constitution failed to provide for the organization of the executive branch of the national government. Together with this fact was the early resolution, after Congressional debate, that the chief executive could freely remove his subordinate officers whose appointment was with consent of the Senate. The basic principle of government administration by departments subordinate to the chief executive became an established fact.

From this point, the author goes on to develop the main part of his thesis by expounding the development and functions of the various executive departments. Readers are introduced to the first presidential cabinet. Considerable emphasis is placed on the fact that Alexander Hamilton took office some six months

before Thomas Jefferson reached the seat of government to become Secretary of State. It is said Washington relied more upon these two men than all others combined. It appears that Hamilton and Jefferson seldom saw problems in the same light so that the feud between these two caused Washington to be deeply concerned over the future of the government.

The growth of the Department of War and of the Navy Department is a very interesting topic in the light of present day events. The Navy was established despite firm opposition by many Congressmen. The War Department proved to be "a difficult and unpopular department" for the secretaries.

The actual establishment of the administrative branches and their policies is fascinating reading. Many of the episodes related appear very humorous to the present day reader. However, those are incidental to the purpose of the book. The author set forth to relate the achievements of these men, and this has been ably done, providing all readers with a better understanding of our national government as a fact, rather than a symbol.

INTRODUCTION TO INCOME TAXATION. Second edition. By James M. Henderson. Rochester, New York: Lawyers Co-Operative Publishing Co. 1949. Pp. x, 535.

For many who have little, if any, practical experience in the field of income taxation, this book can provide a very entertaining introduction to the subject. The author tags his approach as both blasphemous and disrespectful but that does not appear to detract from the value of the work.

The various chapters of the book develop different considerations. In Chapter I, the author delves into the very basic concepts and terminology of income taxation so that one can easily understand the rest of the book. If one harbors a remote hope that income taxes in their present forms are beyond the Constitutional power of the government, Chapter II dashes this hope and then an exposition of the present governing tax law leaves but small hope for future relief. Describing the Tax Commissioner's power he says, "(the commissioner) has many teeth, and every one of them is the better to bite with."

In seven more chapters, one is lead blithely through a maze, with pitfalls and traps, that has exacted its toll from the innocent, gullible, unwary or guilty alike. The chapter on exemptions, once a broad topic, is only nine pages long; nevertheless, that seems to cover the subject adequately. Immediately following that chapter, the author presents what might be termed more indirect ways of reducing tax liability by discussing alleviation and avoidance. He warns of the peril in relying upon precedents successfully used by some.

After reading this volume completely, one may not become an oracle in income tax law but one will not be left in the morass of total ignorance. The author has done a remarkable job to impart his knowledge of this ponderous field in such a readable way.

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AMENDING THE CONSTITUTION TO PROVIDE FOR PARTICIPATION IN A WORLD GOVERNMENT

By Burton Andrews*

This is an attempt to set forth some of the legal aspects of the problem of participation by the United States in a World Government in relation to the requirements of the United States Constitution. The general problem of constitutional limitations in relation to participation in the League of Nations and the United Nations Organization has heretofore received attention by law review writers and in view of the worldwide growing movement toward some form of limited World Government, the problem of constitutional limitations for the United States would seem to deserve further attention. Numerous cultural, economic and political questions are, of course, also involved in the problem as to whether the United States should participate in a World Government but they are outside the scope of his discussion.

THE NEW YORK LEGISLATURE AND THE MOVEMENT FOR WORLD GOVERNMENT

On January 10, 1950, a "joint resolution in relation to participation by the United States in a world federal government," was introduced in the New York Legislature by the chairman of the Senate Finance Committee and by the minority leader in the Assembly.[1] The text of the Resolution is as follows:

> "WHEREAS, Modern science has produced weapons of war which are overwhelmingly destructive and against which there is no sure defense, and war is now a threat to the very existence of our civilization; and

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*Professor of Law, Albany Law School.

1 1950 New York Legislative Record and Index, p. 554; Senate Resolution No. 8; Assembly Resolution No. 25.

"WHEREAS, The high taxes and huge deficits resulting inevitably from the arms program we must pursue as long as the possibility of aggression exists threaten us with bankruptcy and the destruction of the American way of life; and

"WHEREAS, The effective maintenance of world peace is the proper concern and responsibility of every American citizen; and

"WHEREAS, The people of the State of New York, while now enjoying domestic peace and security under the laws of their federal, state and local government, deeply desire the guarantee of world peace; and

"WHEREAS, All history shows that peace is the product of law and order, and that law and order are the product of government; and

"WHEREAS, The State of New York, as the home of the United Nations has a particular responsibility to support and strengthen that organization; and

"WHEREAS, The United Nations, as presently constituted, although accomplishing great good in many fields, has not been given authority to enact, interpret or enforce world law, and under its present charter is incapable of restraining any major nations which may foster or foment war; and

"WHEREAS, The charter of the United Nations expressly provides, in Articles 108 and 109, a procedure for reviewing and altering the Charter; and

"WHEREAS, Many states have memorialized Congress, through resolutions by their state legislatures or in referenda by their voters, to initiate steps toward the creation of a world federal government reserving to the nations and to the people those rights not specifically granted as necessary to the establishment and the maintenance of world law and order; and

"WHEREAS, Many states have already applied to Congress for the identical purpose proposed hereinafter in this resolution; and

"WHEREAS, Several nations have recently adopted constitutional provisions to facilitate their entry into a world federal government with powers adequate to assure peace; now, therefore, be it

"RESOLVED (if the Assembly concur), That application is hereby made to the Congress of the United States, pursuant to Article V of the Constitution of the United States, to call a convention for the sole purpose of proposing amendment of the Constitution to expedite and insure the participation of the United States in a world federal government, open to all nations, with powers which, while defined and

limited, shall be adequate to preserve peace, whether the proposed charter or constitution of such world federal government be presented in the form of amendments to the charter of the United Nations, or by a world constitutional convention, or otherwise; and be it further

"RESOLVED (if the Assembly concur), That copies of this resolution be immediately transmitted to the President of the United States, the Secretary of the Senate of the United States, the Clerk of the House of Representatives of the United States, and to each member of the Congress duly elected from the State of New York and that the latter be urged to devote themselves to the task of accomplishing the purpose of this resolution."

While no action was taken at the 1950 session of the legislature, it is likely that the resolution will be again introduced at a subsequent if not the next session, since it is but a phase of the worldwide movement for a limited form of World Federal Government.

Resolutions in substantially the same language were adopted in 1949 by the legislatures in the states of California,[2] Connecticut,[3] Florida,[4] Maine,[5] New Jersey,[6] and North Carolina.[7]

In Congress a number of resolutions seeking to commit the United States in varying degrees to the promotion of World

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2 1949 Statutes of Calif., Concurrent and Joint Resolutions and Constitutional Amendments, ch. 96, p. 3095.

3 1949 Senate Joint Resolution No. 15; Journal of the Senate, p. 692; Journal of the House, p. 761.

4 1949 Senate Memorial No. 282 adopted by the Florida Legislature, per letter, dated April 10, 1950, by R. A. Gray, Secretary of State of Florida, in possession of the writer.

5 1949 Legislative Record, p. 928.

6 1949 Minutes of General Assembly, pp. 738, 954.

7 1949 Session Laws North Carolina, Resolution No. 37, p. 1734.

Government have been introduced and are pending.[8] The subcommittee under the chairmanship of Ebert Thomas, of the Senate Foreign Relations Committee, held public hearings in February 1950, on these proposed resolutions, and the House Committee on Foreign Affairs held public hearings in May 1948 and October 1949, on similar proposed resolutions.

The postwar constitutions of France, Italy and West Germany have made express provision for participation in a system of World Government.

A preamble to the French Constitution adopted October 13, 1946, provides:

> "On condition of reciprocity, France consents to the limitations of sovereignty necessary to the organization and defense of peace."[9]

The Italian Constitution promulgated December 27, 1947 reads:

> "Art. 11. Italy repudiates war as an instrument of aggression against the liberties of other peoples and as a means of settling international disputes; agrees, provided she enjoys parity with other States, to any limitations on sovereignty required to establish an order which will secure peace and justice between nations; and promotes and fosters international organizations directed towards this purpose."[10]

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8 In the Senate S.C.R. 56 sponsored by 19 Senators, reads: *"Resolved by the Senate (the House of Representatives concurring),* That it is the sense of the Congress that it should be a fundamental objective of the foreign policy of the United States to support and strengthen the United Nations and to seek its development into a world federation open to all nations with defined and limited powers adequate to preserve peace and prevent aggression through the enactment, interpretation, and enforcement of world law."

S.C.R. 57 sponsored by 20 Senators, reads: *"Resolved by the Senate (the House of Representatives concurring),* That the President is requested to invite the democracies which sponsored the North Atlantic Treaty to name delegates, representing their principal political parties, to meet this year with delegates of the United States in a federal convention to explore how far their peoples, and the peoples of such other democracies as the convention may invite to send delegates, can apply among them, within the framework of the United Nations, the principles of free federal union."

Other Senate resolutions include S.C.R. 52, S.C.R. 66, S.C.R. 72 and S.R. 133.

In the House of Representatives the counterpart of S.C.R. 56 is H.C.R. 64 which is sponsored by 111 members of the House.

9 Current History 12:161 Feb. 1947.

10 1947 Yearbook on Human Rights, p. 163, United Nations Publication.

In the Bonn Constitution for West Germany, adopted in 1949, Article 24 provides:

"1. The federation (federal republic of Germany) may by legislation transfer its sovereign powers to international institutions.

"2. In order to preserve peace the federation may join a system of mutual collective security; in so doing, it will consent to those limitations of its sovereign powers which will bring about and secure peaceful and lasting order in Europe and among the nations of the world.

"3. For settlement of international disputes the federation will join the general comprehensive obligatory system of international arbitration."[11]

These constitutional provisions may be termed "enabling provisions." They constitute a legal basis for action by the respective nations for participation in a World Government. The purpose, as therein expressed, of the proposed New York resolution and similar resolutions adopted in other states is to bring about an "enabling provision" for the United States. The procedure is authorized by Article V of the United States Constitution which requires that Congress "on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, ..."[12]

This form of action has been taken not less than 77 times prior to 1930 by the legislatures of at least 36 of the states in regard to a variety of different subjects and sometimes without specifying any subject.[13] However, no such convention has ever been called.[14] This is one of the two methods specified in the Constitution for initiating amendments, the alternative method being for Congress itself to propose the amendment. The movement for direct election of United States Senators expressed itself

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11 N. Y. Times, May 9, 1949; reprint Cur. Hist. June 1, 1949.

12 Orfield, "Amending the Federal Constitution," Michigan Legal Studies, 1942, 242 pages, discusses the law of the amendment process.

Denys P. Myers, "The Process of Constitutional Amendment" published as Senate Document No. 314, 76th Cong., 3d Sess., outlines the procedural details involved.

13 Senate Document No. 78, 71st Cong., 2d Sess.

14 Wheeler, "Is a Constitutional Convention Impending," 21 Ill. L.R. 782, April 1927, discusses the legal problems as to such a convention.

in action by 29 state legislatures applying to Congress to call a convention. When the applications became insistent, Congress itself proposed an amendment which upon ratification became the Seventeenth Amendment.

Since the United States Constitution was adopted, the New York Legislature has twice applied to Congress for the calling of a Constitutional Convention to propose amendments: on February 5, 1789, the Assembly adopted a resolution:

> "Resolved (if the Honorable the Senate concur therein) That an application be made to the Congress . . . that a Convention of Deputies from the several States be called, as early as possible, with full powers to take the said Constitution into their consideration, and to propose such amendments thereto, as they shall find best calculated to promote our common interests, *and secure to ourselves and our latest posterity, the great and unalienable rights of mankind.*"[15]

On February 7, 1789, the Senate concurred[16] without amendment and the resolution was presented in Congress May 6, 1789.[17] The second application was by Senate resolution adopted March 1, 1906, reading as follows:

> "Resolved (if the Assembly concur), That application be and hereby is made to Congress, under the provisions of Article five of the Constitution of the United States for the calling of a convention to propose an amendment to the Constitution of the United States whereby polygamy and polygamous cohabitation shall be prohibited and Congress shall be given power to force such prohibition by appropriate legislation."[18]

The House concurred without amendment on March 2, 1906,[19] and the resolution was presented in Congress April 2, 1906.[20]

No limitation as to the subject matter of an amendment to the United States Constitution has been upheld by the courts. Article V itself contains the limitation that "no state shall be

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15 Italics as in original printed Journal.

16 1789 Assembly Journal, p. 105-6, Senate Journal, p. 56.

17 Senate Document No. 78, 71st Cong., 2d Sess.

18 1906 Laws of New York, Vol 2, p. 1899.

19 Ibid. p. 1900.

20 Cong. Rec. Vol. 40, p. 4551; as to the legal effect of these pending applications together with those of other states see Wheeler, op. cit. fn. 14.

deprived of its equal suffrage in the Senate. . . ." This is the only express limitation that might be recognized. Implied limitations have been urged against the validity of various amendments but all have been rejected. It has been stated that ". . . no limitations on substance have yet been found, and it is unlikely that any will ever be found."[21]

Consequently, the legality of the proposed resolution by the New York Legislature applying to Congress for a convention to propose an amendment to authorize the United States to participate in a limited World Federal Government, would not seem to be open to question but whether such an amendment is legally necessary is still a proper query.

NECESSITY OF AN AMENDMENT

Is the United States legally able to participate in a World Government without the amendment sought by the Resolution proposed in the New York Legislature? The answer to this question requires consideration of the powers, within constitutional limitations, delegated to the National Government in the international field as contrasted with the powers proposed to be delegated to the World Government.

The terms of the Resolution indicate in a generalized way the powers to be delegated to a World Government. The seventh preamble states that "The United Nations . . . has not been given authority to enact, interpret or enforce world law . . ." The ninth preamble proposes "reserving to the nations and to the people those rights not specifically granted as necessary to the establishment and the maintenance of world law and order." The eleventh preamble refers to the "recently adopted constitutional provisions" by several nations "to facilitate their entry into a world federal government with powers adequate to insure peace," which presumably includes those adopted by France, Italy and West Germany as above set forth. And the body of the Resolution states that the contemplated amendment is "to expedite and insure the

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21 Orfield, op. cit. p. 23 fn. 12; and see Ch. IV for a review of the "implied limitations" and the case law thereto appertaining.

participation of the United States in a world federal government, open to all nations, with powers which, while defined and limited, shall be adequate to preserve peace."

As the Constitution now stands the total authority over relations between the United States and other nations is conferred upon and exercised by the National Government exclusively,[22] that is by the President and Congress as to initiation, conduct and termination of relations and by the courts as to observance of constitutional limitations through their power of judicial review. The most formal exercise of such powers is the making of a treaty, requiring proposal by the President and ratification by "two-thirds of the Senators present." Alternative with or supplemental to the treaty-making power, is concurrent action by the two houses of Congress by the ordinary procedures in the enactment of statutes or the adoption of joint or concurrent resolutions. And lastly, executive agreements with other nations may be made by the President pursuant to his constitutional powers, independently of Congress, or pursuant to provisions of a treaty or action by Congress. The treaty power is hereafter usually mentioned since none of the other forms of international action is essentially different in its effects and none is of a higher dignity.

It seems reasonable to infer that what is to be accomplished through the amendment sought by the proposed Resolution is that the people of the United States shall make a redistribution of that body of powers over international relations of the United States now delegated exclusively to the National Government, so that such powers shall be divided between the National Government and the World Government and that each shall be supreme in the exercise of its delegated powers.

Probably the strongest point in the argument for the amendment, or against the amendment, depending on the point of view, is that the National Government does not now have the authority to transfer any of its delegated powers over the international relations of the United States to the organs of a World

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22 Chief Justice Taney in Holmes v. Jennison, 1840, 39 U.S. (14 Pet.). 540, 575, and the same principle is declared by other Justices in numerous cases .

Government. While the Constitution does not express this limitation it has been confidently asserted from the beginning and repeated by eminent authorities as an implied limitation.

All governmental power is thought to be comprehended within the categories: legislative, executive and judicial. The Constitution provides:

> "Article I, Sec. 1: All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives."
>
> "Article II, Sec. 1: The executive power shall be vested in a president of the United States of America."
>
> "Article III, Sec. 1: The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish."

For the National Government to attempt without a constitutional amendment to give, by treaty or otherwise, a World Government "authority to enact, interpret or enforce world law" or to confer those powers "necessary to the establishment and the maintenance of world law and order" or those "powers which, while defined and limited, shall be adequate to preserve peace," would transfer some part of the legislative, executive and judicial powers of the National Government to the World Government and would be impliedly contrary to these constitutional provisions. This implied limitation has been often asserted in relation to what can be done by a treaty.

Mr. Justice Field of the United States Supreme Court expressed it in these words: "The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered. . . . The exercise of these public trusts is not the subject of barter or contract."[23]

Alexander Hamilton: "The only constitutional exception to the power of making treaties is that it shall not change the Constitution; which results from this fundamental maxim, that

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23 The Chinese Exclusion Case, Chae Chan Ping v. U.S., 1889, 130 U.S. 581, 609.

a delegated authority cannot alter the constituting act unless so expressly authorized by the constituting power. An agent cannot new-model his own commission."[24]

James Madison: "I do not conceive that power is given to the President and Senate . . . to alienate any great, essential right. I do not think the whole legislative authority have this power. The exercise of the power must be consistent with the object of the delegation."[25]

John C. Calhoun: "It (the treaty-making power) can enter into no stipulation calculated to change the character of the government; or to do that which can only be done by the Constitution-making power; or which is inconsistent with the nature and structure of the government—or the objects for which it was formed."[26]

The same view in principle has been expressed by numerous federal and state judges, statesmen and professors of constitutional law, including: John Jay, Taney, Story, Cooley, Swayne, Clifford, McLean, Duer, Miller, Butler, and White; Jefferson, Richard Henry Lee, Gallatin, Clay and Blaine; Thayer, Hershey, Morey, vonHolst, Wharton and Willoughby, and many others.[27]

It seems reasonable to conclude that, although it has been said that no treaty has ever been held unconstitutional[28] yet this implied limitation on the treaty-making power is as clearly established and in full force and effect as any constitutional limitation can be in the absence of a court decision directly on the point.

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24 Quoted by Edwards, "Are the Terms of the Covenant for the Proposed League of Nations Repugnant to the Constitution?" 89 Cent. L.J. 244, 247.

25 3 Elliott, "Debates on the Federal Constitution" 514.

26 1 Works of Calhoun 204, quoted by Devlin, "The Treaty Power" Sec. 138, p. 134.

27 For collections of authorities see Tucker, "Limitations on the Treaty-Making Power," Ch. I and II; Judge Stafford, "The League of Nations," 47 Wash. L. Rep. 146 (1919).

28 Cathcart, "The Proposed Successor to the League of Nations and the United States Constitution," 20 Calif. S.B.J. 37, 41 (Jan.-Feb. 1945).

This implied limitation was the principal legal argument against participation by the United States in the League of Nations[29] and later as to participation in the United Nations Organization.[30] Illustrative of the attitude is the statement by Senator Lodge while Chairman of the Foreign Relations Committee of the Senate, that certain of the military clauses of the covenant of the League constituted "a direct interference with the power of Congress to raise armies and maintain navies, and we shall be compelled to have a constitutional amendment in order that this provision may be carried out."[31]

Others have maintained that the proposed adherence to the Covenant of the League of Nations[32] was, and current participation in the United Nations Organization[33] is, within the treaty-making powers of the National Government.

The principal reason sustaining participation in the United Nations Organization as not contrary to the above discussed implied limitation is in the nature of a treaty. Governments from

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29 Bartlett, "The Constitution or the League of Nations—Which?" 53 Am. L. Rev. 513 (1919).

Peterson, "A Treaty Providing for an Effective League of Nations is Unconstitutional," 89 Cent. L. J. 226 (Sept. 1919).

Stafford, "May the United States Join the Proposed League of Nations by an Exercise of the Treaty-Making Power?", 64 Ohio Law Bull. 264 (1919).

Also see Charteris, "The League of Nations and the Doctrine of Sovereignty," The Scots Law Times, Statutes p. 18 (1920).

30 Borchard, "The Charter and the Constitution," 39 Am. J. of Int. Law 767 (1945).

Manion, "Some Legal Aspects of American Sovereignty," 20 Notre Dame Lawyer 1 (Sept. 1944).

31 Quoted by Bartlett, op. cit. p. 527, fn. 29.

32 Mathews, "The League of Nations and the Constitution," 18 Mich. L.R. 378 (1920).

Edwards, "Are the Terms of the Covenant for the Proposed League of Nations Repugnant to the Constitution?" 89 Cent. L. J. 244 (Oct. 3, 1919).

Tucker, "Constitutionality of the Covenant of the League of Nations," 89 Cent. L.J. 79 (Aug. 1919).

33 Cathcart, op. cit. fn. 28.

Corwin, "The Constitution and World Organization" 1944, Princeton University Press.

Magnusson, "Our Membership in the United Nations and the Federal Treaty Power under the Constitution," 34 Va. L.R. 137 (Feb. 1948).

Stauss, "Constitutionality of Participation in a Council to Police the Peace," 18 Tenn. L. R. 646 (Apr. 1945).

time immemorial have always acted through agents. Those carrying on relations directly between the heads of nations and their designated subordinates are known as the diplomatic service. Meetings of diplomats representing their respective governments have been common in world history. What they do or do not do is determined by instructions and directions from their respective governments. Diplomats only give advice and recommendations to their respective governments like any agent to his principal. Treaties are negotiated and drafted by meetings of diplomats wherein reciprocal promises or obligations are proposed and each then submits the draft to his government for ratification and execution or rejection. Thus international relations are initiated.

But after a treaty is ratified by the home governments, the promises or respective undertakings are not carried out until each government unilaterally enacts legislation so doing, that is the Congress in the United States,[34] and after supporting legislation is enacted, while the obligations are in most instances performed yet, so long as performance is executory, the treaty obligations at any time can be unilaterally renounced either by action inconsistent with the treaty provision[35] or by express denuncia-

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34 The principle that a treaty obligation cannot be recognized by the courts until executed by supporting legislation was explained by Chief Justice Marshall thus:

"A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial, but is carried into execution by the sovereign power of the respective parties to the instrument."

He then notes that in the United States a treaty, when self-operating by its terms, becomes law without supporting legislation by Congress but a promissory treaty provision is not operative until executing legislation by Congress is enacted. The latter was the situation as to the treaty before the Court since Congress had not up to 1829 by legislation carried out the promise in the treaty made in 1819. Foster v. Neilson, 1829, 27 U.S. (2 Pet.) 253, 314.

35 That a government's treaty obligation is terminated as a matter of law by later inconsistent action was held by the court in an opinion by Mr. Justice Swayne who stated: "The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty." The Cherokee Tobacco 1870, 78 U.S. (11 Wall.) 616, 621.

Mr. Justice Miller: "Another objection to the validity of this act of Congress, is that it violates provisions contained in numerous treaties of our government

tion.[36] This is the nature of a treaty.

The form of the action whereby the United States was to become a member of the League of Nations and did become a member of the United Nations Organization, was a treaty. The substance of the action taken as to the United Nations Organization also is that of a treaty. The authority of the delegates in the Security Council and the Assembly is to give advice and recommendations to their respective governments and any drafts of agreements by the delegates must be submitted to their respective governments for ratification and supporting legislation which may or may not be enacted and if enacted yet such action so long as performance is executory is subject to unilateral renunciation at

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with friendly nations . . . . We are of opinion that, so far as the provisions in that act may be found to be in conflict with any treaty with a foreign nation, they must prevail in all the judicial courts of this country. We had supposed that the question here raised was set at rest in this court by the decision in the case of *The Cherokee Tobacco.*" And further he said: "In short, we are of opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal." Head Money Cases, 1884, 112 U.S. 580, 597, 599.

Mr. Justice Field: "By the Constitution a treaty is placed on the same footing and made of like obligation, with an act of legislation . . . if the two are inconsistent, the one last in date will control the other. . . ." And in a subsequent case the court held the same upon an opinion by him stating: "It must be conceded that the act of 1888 is in contravention of express stipulations of the treaty of 1868 and of the supplemental treaty of 1880, but it is not on that account invalid or to be restricted in its enforcement. The treaties were of no greater legal obligation than the act of Congress . . . . the last expression of the sovereign will must control." Whitney v. Robertson, 1887, 124 U.S. 190, 194; The Chinese Exclusion Case. Chae Chan Ping v. U.S., 1889, 130 U.S. 581, 600.

Mr. Justice Gray quoted the above language and applied the principle in the subsequent case of Fong Yue Ting v. U.S., 1893, 149 U.S. 698, 720-2.

Chief Justice White, quoting the lower court's opinion said: ". . . it is well settled that when a treaty is inconsistent with a subsequent Act of Congress, the latter will prevail. . . .Treaties are contracts between nations and by the Constitution are made the law of the land. But the Constitution does not declare that the law so established shall never be altered or repealed by Congress. Good faith toward the other contracting nation might require Congress to refrain from making any change, but if it does act, its enactment becomes the controlling law in this country." Rainey v. U.S., 1914, 232 U.S. 310, 316.

36 From examination of the cases in the United States Supreme Court, it seems that problems are more likely to arise because a government fails to enact legislation to carry out its promise in a treaty or because one of the governments takes action inconsistent with the terms of the treaty, rather than because one of the governments expressly denounces its treaty obligations.

any time by inconsistent action or express denunciation.[37] Furthermore, any member may at any time withdraw from membership and cease to participate as did Germany and Japan from the League of Nations and as the Soviet Union has done in part by boycott of sessions of the delegates of the United Nations Organization.[38]

Consequently the League of Nations and the United Nations Organization would seem to be within the treaty-making power. The sessions of the delegates in the United Nations Organization are meetings of diplomats.[39] The innovation in international relations wrought by the creation of the League of Nations and the United Nations Organization is the institution of a permanent joint arrangement for periodic meetings of diplomats for the continuous negotiation of treaties about matters generally of international interest[40] and their action constitutes advice and recommendations to their respective governments.

The difference between action taken by diplomats as to treaties (such as action by the United Nations Organization) and action by a government as to law, (such as the proposed action by a World Government "to enact, interpret or enforce world law") was pointedly described years ago in words appropriately applicable today:

> "Government implies the power of making laws. It is essential to the idea of a law, that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation."[41]

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37 This seems to be analogous to the "Doctrine of Local Nullification."

38 This appears to be analogous to the "Right of Secession."

39 "The organs of the League are not so much representative assemblies as they are congresses of ambassadors. . ." Mathews, op. cit. p. 388, fn. 32.

In 1946 when President Truman appointed Mr. Austin as United States delegate to the Security Council, he stated that Mr. Austin's rank was that of Ambassador, the highest rank in the diplomatic service.

40 Permanent international institutions have been previously used but restricted to a specific subject such as the Universal Postal Union. See Baldwin, "The Vesting of Sovereignity in a League of Nations," 28 Yale L.J. 209 (1919).

41 Alexander Hamilton, The Federalist No. 15, p. 94, The Heritage Press edition.

Consequently, as a matter of law, participation in the United Nations Organization is not contrary to the above discussed implied limitation of the Constitution since no part of the legislative, executive or judicial power of the National Government over the international relations of the United States has been transferred to the United Nations Organization but participation in a World Government would involve a transfer of some part of those powers and would be contrary to such implied limitation.

It would seem to follow that the President cannot properly open exploratory conversations with the governments of other nations to ascertain attitudes toward the organization of a World Government and that neither the Senate nor Congress has the authority to provide that the President or the Executive Department shall do that, except for the purpose of obtaining information in considering the advisability of proposing an amendment such as is contemplated by the proposed New York Resolution.

Without such an amendment, to ask the President or Congress to undertake to have the Charter of the United Nations Organization amended to provide for a World Government in which the United States would participate or to undertake, independently of the United Nations Organization, by another treaty to organize a World Government in which the United States would participate, would seem to request a violation of the Constitution and a breach of faith with the American people since it would necessarily involve a transfer of some part of the powers of the National Government over the international relations of the United States which the American people have never authorized the National Government to do.[42]

Nor can it be supposed that the power resides in the state governments separately from the National Government to commit

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42 In this light the resolutions pending in Congress and on which public hearings have been held, seem out of place, unless they can be construed as expressions of desire that an amendment to the Constitution be proposed such as is contemplated in the proposed New York Resolution.

the United States or any part of it to participation in a World Government.[43]

While it seems never to have been done yet inferentially a state has authority to make some agreements or compacts with other nations, subject to consent of Congress, under Article I, Sec. 10, clause 3 which reads:

> "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State or with a foreign Power. . ."

This clause is in the same section with clause 1 which reads:

> "No State shall enter into any Treaty, Alliance or Confederation; . . ."

and all parts of the Constitution must be read in relation to the whole instrument.

The argument against the authority of any state, separately or all the states together, even with the consent of Congress, to agree to participate in a World Government would seem clear. The words "Agreement or Compact" should be construed with and are lesser in meaning than the words "Treaty, Alliance, or Confederation" which are absolutely forbidden and to which Congress is not authorized to consent and a World Government is of greater significance and authority than any "Treaty, Alliance, or Confederation." Furthermore, the people of the United States have by the Constitution delegated to the National Government exclusive control over the foreign relations of the United States and this delegation is not subject to revocation or impairment by action of any state legislature so that it would seem impossible that a state or any group of states could by any legal action transfer any part of the authority of the National Government over international relations of the United States, other than by participation in the amending process provided in Article V.

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43 This possibility appears to deserve passing notice since in 1949 one state legislature (30-0 in the Senate and 76-1 in the House) authorized popular election in August 1950 of 3 delegates to a World Constituent Assembly to meet in Geneva, Switzerland, in autumn of 1950 to draft a World Constitution, and appropriated $25,000 for their salaries and expenses with the limitation that the money should not be spent unless 15 additional states adopted similar legislation. 1949 Public Acts of Tenn., ch. 117, p. 364.

From these considerations we conclude that an amendment to the Constitution is necessary before the United States can legally participate in a limited World Federal Government.

But perhaps it is permissible at this point to note the extra legal, or maybe a *quasi* legal or perhaps it is a legal, alternative to an amendment: the gradual transfer of power from the National Government to a World Government by an evolutionary process in the treaty-making power. Mr. Justice Holmes in his opinion upholding a treaty in a famous case seems to have recognized that the treaty-making power is subject to evolutionary changes by these words:

> ". . . when we are dealing with words that also are a constituted act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . The case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago."[44]

But can the treaty-making power be expected to evolve to the point where the United States will be participating in a World Government that has only a treaty basis? Some progress on this alternative seems to be transpiring.

The United States Government Manual since its publication in permanent form in 1939 has carried a list of "International Organizations in which the United States Participates."[45] In October 1939, 58 were listed, 77 in 1945, and in 1946 the list reached 150, exclusive of bilateral agencies; thereafter the number receded to 86 in 1947, 77 in 1948 and 72 in 1949. In 1950 the Department of State published a separate volume devoted to these International Agencies and in the Foreword Mr. John D. Hickerson, Assistant Secretary of State for United Nations Affairs, summarizes the pattern of these agencies thus:

> "They range in size from the United Nations, with its 3,000 employees, to the Central Bureau of the International Map of the World on the Millionth Scale, which has no full time employees. Some of them are very old, like the Universal Postal Union (1878); some are new, like the International Authority for the Ruhr (1949). Their

44 Missouri v. Holland, 1920, 252 U.S. 416, 433.

45 The temporary form of Manual in February 1939 listed 43.

activities are global, like those of the World Health Organization; and they are regional, like those of the Caribbean Commission.

"All of these organizations taken together do not compose any 'world government.' They cannot be neatly divided into an executive, a legislature, and a judiciary. Taken together, however, they form a vast and complex network of functional organizations which contribute to the safety and well-being of the peoples of the United States and of the rest of the world."

Progress toward World Government by this road depends on whether there is a growing tendency to accept as binding the recommendations of these international agencies. To ascertain this fact would require analysis of their work in past ages and in current times to ascertain factors such as: the increase in number and types of functions performed, the relative importance of the functions performed, the freedom of the personnel in moving about in the territory of member nations, the extent of standing instructions or authority given without subsequent retraction or interference, the nature and extent of the revisions from time to time of the treaties constituting the basis of functions, the continuity of appropriations, the acceptance of the work performed or its rejection by member nations i.e. the tendency toward or away from "Local Nullification," and the instances of withdrawal by member nations from participation in such agencies i.e. the tendency toward or away from assertion of a "Right of Secession."

That some achievements have been made by international agencies is apparent[46] but the experience of the world with the treaty system has not been altogether satisfactory and has inherent difficulties in the opinions of some commentators.[47] Assuming it would be possible to achieve World Government by this alterna-

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46 See the Annual Reports of the Secretary-General of the United Nations and previously of the League of Nations.

47 In 1919 Judge Stafford: "If we do form a league of nations which is at all analogous to the loose leagues that preceded our own Constitution we must expect to meet the same questions that the fathers met. There will be found to be the same weakness in a central body that cannot enforce its mandates but can only make requests. There will arise the same confusion touching the interpretation of the league's organic law, requiring a supreme court of the nations to interpret the meaning of the instrument for all; and eventually the same necessity will be found to exist for an executive power to carry out the decisions that are reached." "The League of Nations," 47 Wash. L.R. 146, 150 (1919).

In 1884 Mr. Justice Miller: "A treaty is primarily a compact between inde-

tive, is it desirable? Such a government would not rest on the direct suffrage of the people. Also, would it not involve building up an ambiguous system comparable to that existing in the United States before the Civil War, where the growing awareness of unity made impracticable the assertion of the "rights" of Local Nullification and Secession, if they be admitted to have legally existed. But it took a conflagration to demonstrate the impracticability.

World Government through a constitutional amendment would afford a clearer legal sanction. The delegation of "defined and limited" powers would presumably be in two packages: one authorizing enactment of world law operating directly as to individuals and enforced through the courts which would seem to have a high probability of success. The other would relate to laws governing nations. This is inherently difficult because of the relative impossibility of coercing a nation. The delegation of the first bundle of powers to a World Government would probably reduce in number and minify the occasions for exercise of powers as to nations. The likelihood would be a difficult transition period until the jurisidiction of the World Government would be accepted as a matter of course, as was true concerning recognition by the States of the jurisdiction of the National Government in the United States.[48]

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pendent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war." Head Money Cases, 1884, 112 U.S. 580, 598.

In 1788 Alexander Hamilton: "In the early part of the present century there was an epidemical rage in Europe for this species of compact, from which the politicians of the times fondly hoped for benefits which were never realized. With a view to establishing the equilibrium of power and the peace of that part of the world, all the resources of negotiations were exhausted, and triple and quadruple alliances were formed; but they were scarcely formed before they were broken, giving an instructive but afflicting lesson to mankind, how little dependence is to be placed on treaties which have no other sanction than the obligations of good faith, and which oppose general considerations of peace and justice to the impulse of any immediate interest or passion." The Federalist, No. 15, p. 93, The Heritage Press ed.

See also: Peterson, "A Treaty Providing for an Effective League of Nations is Unconstitutional," 89 Cent. L.J. 226 (Sept. 26, 1919).

Umbreit, "An International State," 3 Marquette L.R. 55 (1918-19).

48 See Scott "Judicial Settlement of Controversies between States of the American Union," 3 vol., and comment by Smith, "The Supreme Court and the League of Nations," 20 Col. L.R. 68 (1920).

Assuming the evolutionary alternative to be a legal possibility the problem then as to the legal necessity of an amendment seems to be a choice between: either a gradual transfer of powers from the National Government to a World Government by the processes of erosion and accretion pursuant to developments in the treaty-making power or a delegation by the people of the United States to a World Government of "defined and limited" powers consciously and deliberately made pursuant to an amendment of the Constitution.

PROVISIONS IN AN AMENDMENT

In considering the provisions of an amendment it is necessary to distinguish: (1) what can properly be stated in a resolution such as was proposed in the New York Legislature, (2) what would properly be included in an Amendment to the United States Constitution, and (3) what would properly be included in the organic act for a World Government—whether it be in the form of a World Constitution or an amendment to the United Nations Charter.[49]

The form of the proposed New York Resolution apparently follows the form of resolutions adopted in 1789 and 1906 so that presumably it is correct in form. As to substance probably little more if anything could be added inasmuch as the legislature's authority under Article V extends only to the matter of applying to Congress to "call a Convention for proposing Amendments." Anything more in substance it would seem could only be construed as suggestions to the Convention when called or to the New York delegates who should attend the Convention.

The provisions of the Amendment when and if proposed by the Convention, as sought by the applications of the state legislatures, or by the Congress itself, as occurred in the instance of the Seventeenth Amendment for the direct election of United

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49 Review or discussion of the growing literature on the subject matter of an organic act for a World Government is only indirectly related to the legal aspects of "Amending the Constitution to Provide for Participation in a World Government," and is not here attempted.

States Senators, should and would no doubt receive the careful attention of the ablest constitutional lawyers in the United States. But it may not be out of place to make a few comments as to the Amendment.

The form of constitutional provisions adopted in France, Italy and West Germany would probably be unacceptable to the people of the United States because the language is too general.

A suggested draft of an Amendment was recently published, containing principally provisions for a referendum vote on "a constitution for world government" by an electorate registered specially for the purpose.[50]

This is hardly adequate since it is first necessary to give somebody, presumably the National Government, authority to institute negotiations with the governments of other nations as to the undertaking, to provide some method of selection of official delegates representing the people of the United States and authorizing them to attend a world constitutional convention or other constituent assembly and to participate in drafting an organic act for a world government in the form of a World Constitution or an amendment to the United Nations Charter, or otherwise. Whether delegates should be chosen by the National Government, by State governments or by popular vote in the states separately or by popular vote on a national basis, would need to be decided and specified. The financial obligations incurred would need to be made the burden of the National Government or other taxing authority.

Whether the method of ratification of the organic act for a World Government should be provided in the Amendment as has been suggested or should be left open to the method of ratification which might be specified in that organic act is another choice of alternatives. When the United States Constitution was proposed for adoption, the method of ratification was specified in that instrument, that is, "ratification of the Conventions of nine States" was specified as "sufficient for the Establishment of this Constitution between the States so ratifying the same." Rati-

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50 Common Cause, October 1949, p. 142, 144.

fication by popular vote is today the usual practice and would likely be authorized by the constituent assembly.

The problem of specifying the substantive provisions in the Amendment as to the extent to which the United States would be willing to transfer powers over the international relations of the United States to a World Government would probably provoke the most controversy. Several solutions would be possible. A provision authorizing Congress to transfer such powers from time to time as Congress in its discretion should deem necessary in order to preserve the peace of the world and protect the liberty, lives and property of the people of the United States, would have simplicity of expression and some flexibility in that the line between the powers of the World Government and the National Government could become defined by degrees. This would in a sense be giving the evolutionary process a clear legal basis.

Another disposition of the problem would be to attempt to specify in the Amendment those powers which the United States would be willing, and those the United States would not be willing, to delegate to a World Government. Such negative provisions would be limitations on the scope of the authority of the United States delegates to the constituent assembly in participating in the drafting of the organic act for World Government and would indicate to other nations the general character of the World Government that could be proposed and submitted to the United States for ratification. This would involve the difficulty of attempting at least in part to draft the organic act for the constituent assembly before it met and might be a stumbling block to effective participation by the United States delegation. Other nations might be more inclined to make similar pronouncements and thus make significant progress more difficult if not impossible.

An alternative to placing such provisions in the Amendment would be for Congress and other governmental and nongovernmental groups to express such propositions as advice and recommendations to the constituent assembly and the various delegations and when the organic act was finally proposed the extent of the transfer of powers over the international relations of the

United States would influence the likelihood of ratification or rejection by the United States. This could result, however, in a broader scope for the amending process in the World organic act than would be true if the substantive provisions were expressed in the Amendment since the latter as to any negative provisions might be construed as limitations beyond which amendments to the World organic act could not go as to powers over the international relations of the United States and would be analogous to the exceptions to the amending power expressed in Article V of the United States Constitution.[51] Expression of negative substantive provisions in the Amendment, if so construed would probably lead to a need of further amendments to the United States Constitution in the future, as the proper scope of activity for the World Government became more defined by experience.

Then the Amendment probably should contain a section which has been customary since Amendment XIII, that "Congress shall have power to enforce this article by appropriate legislation," in order that Congress will have the authority to make the necessary readjustments in the government in the United States so that the machinery of the World Government and the United States Government will mesh and to meet any unforeseen problems in giving effect to the popular will, in the event the Amendment should be adopted.

The method of ratification of the Amendment sought by the New York Resolution, if and when proposed, must be determined by Congress under Article V. Two methods are provided: ratification (1) by conventions or (2) by state legislatures, in three-fourths of the States. The former method has been pursued only once—as to the Twenty-First Amendment. The argument for that method as to the Amendment under discussion would seem

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51 Whether subsequent ratification of the World organic act with its amending provision would nullify such negative provisions would be an interesting Constitutional question. Incapacitating provisions in a State Constitution on action by a State Legislature in ratifying an amendment to the United States Constitution have been held ineffective on the ground that action by the State Legislature was a federal act and, like action of Congress in proposing the amendment, not limited by provisions in a State Constitution. Leser v. Garnett, 1921, U.S. 130, 137.

even more cogent than as to any prior amendment—the argument being that when the subject matter involves a change in the organic nature and structure of the Union or of the States it should be approved by the method more directly expressing the popular will, and that action by conventions of delegates elected to express a decision solely on the ratification of the Amendment is more truly representative than action by members of the Legislatures elected for general legislative purposes. But the United State Supreme Court has held that there is no difference in legal efficacy between the two methods of ratification and that "the choice of mode rests solely in the discretion of Congress."[52]

52 United States v. Sprague, 1930, 282 U.S. 716.

DUE PROCESS — CRIMINAL CONFESSIONS IN CAPITAL CASES ARISING IN THE STATE COURTS

By Lewis H. Case and John A. Van Etten

Synthesis of the Cases

"The crime with which these defendants, all ignorant negroes, are charged, was discovered at about one o'clock, P.M., on Friday, March 30, 1934. On that night one Dial, a deputy sheriff, accompanied by others, came to the home of Ellington, one of the defendants, and requested him to accompany them to the house of the deceased, and there a number of white men were gathered who began to accuse the defendant of the crime. Upon his denial they seized him, and with the participation of the deputy they hanged him by a rope to the limb of a tree, and having let him down, they hung him again, and when he was let down the second time and he still protested his innocence, he was tied to a tree and whipped, and still declining to accede to the demands that he confess, he was finally released and he returned with some difficulty to his home, suffering intense pain and agony. The record of the testimony shows that signs of the rope on his neck were plainly visible during the so-called trial. A day or two thereafter, the said deputy, accompanied by another, returned to the home of the said defendant and arrested him, and departed with the prisoner towards the jail in an adjoining county but went by a route which led into the state of Alabama; and while on the way, in that state, the deputy stopped and again severely whipped the defendant, declaring that he would continue to do so until he confessed, and the defendant then agreed to confess to such a statement as the deputy would dictate, and he did so, after which he was delivered to jail."

The above extract from the record of *Brown v. Mississippi,* 297 U.S. 278, 281, illustrates the type of confession-procuring conduct on the part of state law-enforcement officials which first provoked the Supreme Court of the United States in an unanimous decision handed down at the October term of that court, 1935, to strike down a conviction based upon such evidence. The Court pointed out that they had reversed convictions in the past where the accused had been "hurried to conviction under mob dominion—where the whole proceeding is but a mask—without supplying corrective process;"[1] where the accused had been denied the aid of counsel;[2] where the State, by its officers, "through a deliberate deception of court and jury by the presentation of testimony known to be perjured" had obtained a conviction.[3] The Court concluded:

> ". . . And the trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence. The due process clause requires 'that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'. Herbert v. Louisiana, 272 U.S. 312, 316. It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process." (p. 286)

It is notable that the record in this case was apparently devoid of other evidences of guilt; certainly there was absent sufficient evidence, apart from the confessions, to warrant the convictions. Thus, from the language of the Court, the question was left open whether the mere introduction of a confession so obtained would determinately infest an otherwise conclusive determination. The answer to the question lay not in the field of evidentiary stan-

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1 Moore v. Dempsey, 261 U.S. 86, 91.

2 Powell v. Alabama, 287 U.S. 45.

3 Mooney v. Holahan, 294 U.S. 103, 112.

dards, but in the broad latitudes of "judicial fairness," as the Court had previously indicated.[4]

The decision, while primordial in the field of confessions obtained by state agencies, was not startling. Despite such fairly recent statements as that by Mr. Justice Holmes in *Ashe v. Valotta,* 270 U.S. 424, 426 (1926):

> "In so delicate a matter as interrupting the regular administration of the criminal law of the State . . . too much discretion cannot be used, and it must be realized that it can be done only upon definitely and narrowly limited grounds."

the Supreme Court had not been reluctant in specific instances to assert its power of supervision even in the field of criminal law, and its record of action in this field, even in 1936, had not been marked by boundaries nearly so definitive as suggested by Mr. Holmes.[5]

The Court made no attempt in the *Brown* case to render the boundaries more certain. The Supreme Court of Mississippi had dismissed the constitutional objections on the ground that while the activities of the law-enforcement officials constituted the confession compulsory self-incrimination, that exemption from compulsory self-incrimination in the courts of the States was not guaranteed by the federal constitution and could be withdrawn by the state. Mr. Chief Justice Hughes pointed out that self-incrimination was not here involved since such compulsion referred only to "that of the processes of justice by which the accused may be called as a witness and required to testify"; the decision here, he said, rested upon broader grounds: " . . . the freedom of the State in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process." Similarly was the contention disposed of that counsel for the accused had waived his rights, after objecting to the admissibilily of the confessions, by failing to move for their exclu-

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4 Footnotes 1,2,3, supra.

5 For an article taking this view, see: *The Supreme Court, The Fourteenth Amendment and State Criminal Cases,* Univ. of Chicago Law Review, Vol. 3, pp. 244-60.

sion when they had been introduced and the fact of coercion had been proved. "(The) contention," said the Court, " . . . proceeds upon a misconception of the nature of petitioners' complaint. That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void." (p. 286). In this respect, The Supreme Court adopted and set out the language of the Mississippi court in *Fisher v. State,* 145 Miss. 116, 134:

> "Coercing the supposed state's criminals into confessions and using such confessions so coerced from them against them in trials has been the curse of all countries. It was the chief iniquity, the crowning infamy of the Star Chamber, and the Inquisition, and other similar institutions. The constitution recognized the evils that lay behind these practices and prohibited them in this country. . . The duty of maintaining constitutional rights of a person on trial for his life rise above mere rules of procedure and wherever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective." (p. 287)

The *Brown* decision did not long stand alone. Within three years the Supreme Court had two similar "confession cases" before it and to this date has passed on more than a dozen.

Typically, the cases thereafter arising required keener scrutiny in applying the broad test to the particular facts: the elements of coercion became more subtle and less insidious, the manifestations of guilt were more numerous, the processes of the trial itself more proper, and *new* elements were added, such as, supervening time intervals of passivity.

Thus, in *Chambers v. Florida,* 309 U.S. 227 (1939), the evidence of physical violence, or, at least, such evidence as was uncontroverted, indicated less boldness. There was, however, five days and nights of "grilling" by relays of questioners, with the prisoners being afforded only infrequent short intervals for food and rest, and during the last night there was no respite at all. The first confession had been torn up by the State's Attorney because, "that isn't what I want," and he had then instructed the

questioners to continue until they got something "worthwhile."[6] Again the accused were Negroes, four among forty who had been rounded up.

Again the Supreme Court unanimously reversed the conviction.[7] At the same term, in a *per curiam* opinion based upon the *Chambers* decision, the Court reversed the conviction for murder of one Canty, a Negro.[8] Within a year, two other convictions obtained under similar circumstances had been reversed by the highest court;[9] and, at the October term, 1941, still another.[10]

The authority in this limited field now began to assume substantial proportions. Despite the number of decisions, however, the Court had not strayed far as yet from the narrow path hewed out by the *Brown* decision. While uncontroverted evidence of actual physical violence had been uniformly lacking since the *Brown* case, that had been the sole element missing in the subsequent cases, and the cases possessed in common factors irrefutably indicative of coercion: illegal arrest, threats of force, illegal detention, long and more or less continuous questioning, absence of counsel, an "ignorant" defendant.

Furthermore, the Court indicated shortly, in *Lisenba v. California,* 314 U.S. 219, that they were not ready to extend their holdings to date. In this case, the petitioner "while having almost no formal education (was) a man of intelligence and business experience." He was arrested on Sunday, April 19, 1936, on a charge of incest, though in fact the officers were investigating the murder of his wife.

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6 P. 232.

7 For the first time, the Court answered the argument that such law enforcement methods are necessary to uphold our laws. "The Constitution proscribes such lawless means irrespective of the end. And, this argument flouts the basic principle that all people must stand on an equality before the bar of justice in every American court . . . Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are weak, helpless, outnumbered, or, because they are non-conforming victims of prejudice and public excitement." (p. 241).

8 Canty v. Alabama, 309 U.S. 629. Reported below: 238 Ala. 384; 191 So. 260.

9 White v. Texas, 310 U.S. 530; Lomax v. Texas, 313 U.S. 596.

10 Again, Texas: Ward v. Texas, 316 U.S. 597.

"He was held in the District Attorney's suite until 5 or 6 o'clock, was given supper at a cafe, and then conducted to the house next door to his home, where he arrived about 7 or 7:30. Various officers questioned him there, in relays throughout the night, concerning his wife's death. He sat in a chair fully dressed and had no sleep. Monday morning he was taken out for breakfast and went with the officers to point out to them a house at 9th and Alvarado Streets, after which he was taken to the District Attorney's offices. He was brought back to the house next door to his home (where they showed him a dictaphone had been installed) and the questioning was resumed, and continued until about 3 o'clock Tuesday morning, when, he says, he fainted; and others present say he fell asleep and slept until 7 or 8 o'clock. After he had breakfast he was booked at the jail, arraigned before a magistrate, and committed on the incest charge." (p. 229)

Petitioner James claimed that he had been severely beaten during this period, but other than a single slap in the face, there was no substantiating evidence of this claim. Admittedly, on the Monday following his arrest he had been permitted to confer with counsel.

James languished in jail from April 21 until May 2. During this time, "There is no claim that . . . he was interviewed, questioned, threatened, or mistreated by anyone." On May 1, one Hope, a friend of James, was arrested and made a statement implicating James. On being confronted with this statement the following morning, James insisted that he had "nothing to say." About noon of that day an order (unlawful) of court was obtained removing James from prison. He was taken to his home and then to the District Attorney's office where he was questioned throughout the day.

"There is a sharp conflict as to how the session terminated. James says that Officer Southard, who had struck him on April 20, occupied the room alone with him, all others having left; that the officer told him he had been lying all evening and that if he did not tell the truth the officer would take him back to the house and beat him; that this so frightened him that he agreed to do his best to recite to the District Attorney the same story Hope had told. There is much evidence that

no such incident occurred. Deputy Sheriff Killion says that sometime before midnight the others had left petitioner alone with him, and that petitioner turned to him and said something to the effect: 'Why can't we go out and get something to eat; if we do I'll tell you the story'. To this Killion replied that they could go out. Killion and another deputy . . . a lady friend, and another person accompanied petitioner to a public cafe where they had supper and afterwards had cigars. . .

"The State's evidence is that, after they started to smoke, James told a story, of which Killion took notes." (p. 232)

The majority of the Court refused to reverse the conviction though the confession so obtained had been introduced into evidence. While reiterating that the fact of the confessions having been conclusively adjudged by the decision below to be admissible under State law did not answer the question of due process, and that notwithstanding such a determination this Court would apply the test of "fundamental fairness," the Court said:

"In view of the conflicting testimony, we are unable to say that the finding below was erroneous so far as concerns the petitioner's claims of physical violence, threats, or implied promises of leniency.

"Does the questioning on May 2nd, in and of itself, or in the light of (the previous questioning), render the use of the confessions a violation of due process? If we are so to hold, it must be upon the ground that such a practice, irrespective of the result upon the petitioner, so tainted his statements that, without considering other facts disclosed by the evidence, and without giving weight to accredited findings below that his statements were free and voluntary, as a matter of law, they were inadmissible in his trial. This would be to impose upon the state courts a stricter rule than we have enforced in federal trials. . .

"We have not hesitated to set aside convictions based in whole, or in substantial part,[11] upon confessions extorted in

11 Note the terminology. Did this mean that the mere introduction of a coerced confession was insufficient to warrant reversal where there was other substantial evidence?

graver circumstances . . . This case is outside the scope of those decisions.

"Like the Supreme Court of California, we disapprove the violations of law involved in the treatment of the petitioner and we think it right to add that where a prisoner, held incommunicado, is subjected to questioning by officers for long periods, and deprived of the advice of counsel, we shall scrutinize the record with care to determine whether, by the use of his confession, he is deprived of liberty or life through tyrannical or oppressive means. Officers of the law must realize that if they indulge in such practices they may, in the end, defeat rather than further the ends of justice. Their lawless practices here took them close to the line. But on the facts as we have endeavored fairly to set forth, and in the light of the findings in the state courts, we cannot hold that the illegal conduct in which the law enforcement officers . . . indulged, by the prolonged questioning of the prisoner before arraignment, and in the absence of counsel, or their questioning on May 2, coerced the confessions, the introduction of which is the infringement of due process of which the petitioner complains . . ."[12] (pp. 239-40)

With this decision, unanimity in this field departed from the Court hereafter to remain a stranger: Mr. Justice Black and Mr. Justice Douglas dissenting on the authority of the previous decisions.

A hasty examination of the *Lisenba* decision might have left the impression that the decision marked a step backwards by the Court. However, it seems fairer to say that the dissent was engendered by a feeling that the Court should extend the doctrine, rather than a conviction that the Court was retreating from its former position. This is at least so if we compare the factual elements of the *Lisenba* case with the earlier cases in a quantitative rather than qualitative fashion. Aside from established evidence

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12 Note the lurid character of the crime here: according to the confessions, Hope and James had conspired to bring about the death of the woman, first, by rattlesnake poisoning, thence, by burning down the house, and, finally, she was found drowned in the bathtub. (p. 233).

of physical force which was also absent from most of the earlier cases, there was no substantial evidence of threats in the *Lisenba* case, the arrest was lawful, admittedly the advice of counsel was had during a portion of the period, though not during the final questioning, and an interval of passivity had intervened between the first and final questioning so that the questioning which culminated immediately in the confession was considerably less prolonged than in the previous cases.

Any hopes, however, that the *Lisenba* decision defined rigidly the elements necessary for a reversal were dashed by the decision two years later in *Ashcraft v. Tennessee,* 322 U.S. 143. Ashcraft did not fall in the category of "ignorant" which had distinguished James, in the *Lisenba* case, from previous defendants. Ashcraft was a white man, "a citizen of excellent reputation." The decision that the conviction of Ashcraft for murder should be reversed seemed to rest solely upon the facts that an unsigned confession had been introduced into evidence, which confession, if obtained at all,[13] had been obtained after thirty-six hours of continuous questioning by relays of "officers, experienced investigators, and highly trained lawyers," during which period Ashcraft was held incommunicado, without sleep or rest.[14] Significantly absent, as in the *Lisenba* decision, were threats of force and like the *Lisenba* case an incriminating statement of a purported cohort was used in the attempt to "break." The cases can barely be distinguished on the basis that the arrest was baldly illegal in the *Ashcraft* case and that Ashcraft apparently had no opportunity to confer with counsel. However, the Court in the *Ashcraft* decision makes no mention of these facts in its conclusion; further, since the arrest of James for incest in the *Lisenba* case was, apparently, a mere "cover-up" to obtain information concerning the murder, and since James' conference with counsel had occurred nearly a week before his confession, the distinction appears ethereal. Perhaps

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13 The defendant denied that he had made the confession at all. This being a disputed fact, the Supreme Court did not consider it but did state in a footnote: "The use in evidence of a defendant's coerced confession cannot be justified on the ground that the defendant has denied he ever gave the confession." White v. Texas, supra.

14 p. 153.

more substantial is the fact that the questioning in the *Ashcraft* case appeared fiercer in nature and was somewhat more prolonged.

Justice Jackson wrote a stinging dissent to the *Ashcraft* decision. The majority had said, "We think a situation such as that here shown by uncontradicted evidence is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear." (p. 154). Justice Jackson took exception:

> "Heretofore the State has had the benefit of a presumption of regularity and legality. A confession made by one in custody heretofore has been admissible in evidence unless it was proved and found that it was obtained by pressures so strong that it was *in fact* involuntarily made, that the individual will of the particular confessor had been overcome by torture, mob violence, fraud, trickery, threats, or promises . . .
>
> "In determining these issues of fact, respect for the sovereign character of the several States always has constrained this Court to give great weight to findings of fact of the state courts. While we have sometimes gone back of state court determinations to make sure whether the guaranties of the Fourteenth Amendment have or have not been violated, in close cases the decisions of the state courts have often been sufficient to tip the scales in favor of affirmance . . .
>
> "As we read the present decision the Court in effect declines to apply these well-established principles. Instead it: (1) substitutes for determination on conflicting evidence the question whether this confession was actually produced by coercion, a presumption that it was, on a new doctrine that examination in custody of this duration is 'inherently coercive'; (2) it makes that presumption irrebutable—i.e., a rule of law—because, while it goes back of the state decisions to find certain facts, it refuses to resolve conflicts in evidence to determine whether other of the State's proof is sufficient to overcome such presumption; and, in so doing, (3) it sets aside the findings by the courts of Tennessee that on all the facts this confession

did not result from coercion, either giving those findings no weight or regarding them as immaterial.

In discussing these points, Justice Jackson, anticipated questions which subsequently came, and some of which are still to come, before the court:

"Interrogation per se is not, while violence per se is, an outlaw . . .

". . . does the Constitution prohibit use of all confessions made after arrest because questioning, while one is deprived of freedom, is 'inherently coercive'? The Court does not quite say so, but it is moving far and fast in that direction . . .

"If the constitutional admissibility of a confession is no longer to be measured by the mental state of the individual confessor but by a general doctrine dependent on the clock, it should be capable of statement in definite terms. If thirty-six hours is more than is permissible, what about 24? or 12? or 6? or 1? . . ."

At the same term as the *Ashcraft* case, the Supreme Court affirmed a "confession conviction" in *Lyons v. Oklahoma,* 322 U.S. 596. Accepting the distinction made by the Court at face value, the case needs little discussion. An oral confession had been obtained admittedly by coerced methods, including force or fear of force. This confession had been obtained in the early morning. Thereafter petitioner was returned to jail and left there until early afternoon. He was then taken to the penitentiary and there, sometime between eight and eleven o'clock that evening, petitioner signed the second confession which was introduced into evidence. The Court held that in view of the fact that the second confession was separated from the first by a full twelve hours and that at the time of making the second confession petitioner was in the custody of different officials from whom it was not shown he had anything to fear, there was not reversible evidence of "inherent coercion." Justices Rutledge, Murphy and Black dissented.

These latter Justices concurred substantially in an opinion written, one year later, by Justice Douglas which, together with a separate opinion by Justice Frankfurter, resulted in a five-four

reversal of the New York Court of Appeals' affirmance of the conviction for murder of one Malinski who allegedly had shot a police officer.[15] This case represented the most extreme application of the rule—certainly to that date and, perhaps, to the present.

Malinski was arrested on the morning of Friday, October 23, 1942, and, without arraignment, taken to a room in the Bosset Hotel in Brooklyn arriving there at about 8 A.M. He was immediately stripped — purportedly to examine him for bullet wounds but he remained in that condition until 11 A.M. when he was given his shoes, socks, underwear and a blanket. He was questioned, though apparently not continuously, until about 5:30 P.M. At about this time he was put in a room with one Spielfogel, an old friend then serving a sentence in Sing Sing who had agreed to help the police. Following this conference, Malinski orally confessed. Nevertheless, the questioning continued on Saturday and on Sunday he was taken to the scene of the crime where he identified several places having a relationship to the crime and pointed out how the crime was executed. On Monday he was taken to the police garage to identify the automobile used in the robbery out of which the murder had arose, and was again questioned at a police station. On Tuesday morning, at the police station, he made another confession which was stenographically recorded. The latter confession was introduced into evidence.

In reversing the conviction the majority opinion found it necessary to say: "Constitutional rights may suffer as much from subtle intrusions as from direct disregard." The Court did not pass upon the admissibility of the second confession, but reversed upon the ground that though the first oral confession had not been put into evidence, the frequent references to that confession made by the witnesses and by the prosecution in summation conclusively infected the trial. Referring to the means used to obtain that first confession the Court said:

> "If . . . (the) evidence alone is not sufficient to show that that confession was coerced, the comments of the prosecutor

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15 See: 292 N.Y. 360.

place it beyond doubt. For in his summation to the jury he made certain statements which the Court of Appeals said were 'indefensible' . . . and which we think are sufficient to fill in any gaps on the record before us . . . He said that Malinski 'was not hard to break'; that 'He did not care what he did. He knew the cops were going to break him down'. And he added:

'Why this talk about being undressed? Of course, they had a right to undress him to look for bullet scars, and keep the clothes off him. That was quite proper police procedure. That is some more psychology—let him sit around with a blanket on him, humiliate him there for a while; let him sit in the corner, let him think he is going to get a shellacking.'

"If we take the prosecutor at his word, the confession . . . was the product of fear—one on which we could not permit a person to stand convicted for a crime."

Chief Justice Stone, in an opinion for affirmance which was concurred in by Justice Roberts, Reed and Jackson, vigorously attacked a decision rendered upon such a basis:

"The Court sets aside the jury's verdict solely because of the interpretation it places upon the conflicting testimony in the light of certain remarks . . . made by the prosecuting attorney in the course of his summation to the jury. But the prosecutor did not testify in the case, and it does not appear that he was present at any of the interviews of petitioner by the police, or had any knowledge of the alleged coercion. At most, his remarks were an ill-advised attempt at justification of the coercion which the defense had alleged. . ."

The dissent also felt that the case came within the ruling of *Lyons v. Oklahoma, supra,* which the majority distinguished on the ground that the first confession here had "gotten to the jury" as evidence of guilt, whereas in the *Lyons* case "it was submitted to the jury only insofar as it threw light on the voluntary character of the subsequent confessions . . ."

Further, the majority opinion dispelled any doubt that might have remained as to whether the confession in such a case need be a substantial portion of the evidence upon which the convic-

tion rested, Justice Douglas remarking, "And if (a coerced confession) is introduced at the trial, the judgment of conviction will be set aside even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict." In view of the evidence before the Court in that case, the remark does not appear to be dictum.

In the light of the *Malinski* decision, *Haley v. Ohio,* 332 U.S. 596, which came before the Court in 1947 was anticlimatic, though it too warranted a dissent by four of the Justices.[16] In this case a 15-year-old boy was arrested about midnight on a charge of murder and questioned by relays of police from shortly after midnight until about 5 A.M., without benefit of counsel or any friend to advise him. When confronted with alleged confessions of his alleged accomplices at this time, he signed a confession typed by the police and the confession was admitted into evidence. After his confession, he was held three days incommunicado before arraignment. The Court said simply:

> "What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used . . .
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> "The age of petitioner, the hours when he was grilled, the duration of his quizzing, the fact that he had no friend or counsel to advise him, the callous attitude of the police towards his rights combine to convince us that this was a confession wrung from a child by means which the law should not sanction . . ."

If the *Malinski* decision represented the most extreme application of the doctrine to a particular set of facts, three decisions rendered this past summer, *Watts v. Indiana,* 338 U.S. 49; *Turner v. Pennsylvania,* 338 U.S. 62; and *Harris v. South Carolina,* 338 U.S. 68, emphasized most forcefully the doctrinal differences which exist between the individual Justices of the Supreme Court upon this subject.

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16 Chief Justice Vinson, Justices Burton, Reed and Jackson.

The facts recited in the cases are not novel. In each a suspect was taken into custody, held several days without arraignment, without the aid of counsel or friends, and was not informed of his constitutional rights. Questioning during the period, while not continuous, was frequent and often prolonged. After varying intervals, each of the petitioners confessed, and his confession was introduced into evidence at his trial.

Upon these uncontroverted facts, the majority of the Court voted for reversal of each of the convictions. In the light of the *Malinski* decision, the cases are significant, not so much for their holdings as for the number of separate opinions written and the dictum and discussions of the problem contained in the opinions. Harking back to the *Ashcraft* and *Malinski* decisions, The Chief Justice, Mr. Justice Reed and Mr. Justice Burton, in voting for affirmance of each of the convictions, contented themselves with a simple re-expression: "On the record before us and in view of the consideration given to the evidence by the state courts and the conclusion reached . . . (we) believe that the judgment should be affirmed."

Mr. Justice Jackson wrote a single opinion in which he concurred with the majority in the *Watts* decision and dissented in the other two holdings.[17]

> "These three cases, from widely separated states, present essentially the same problem. Its recurrence suggests that it has roots in some condition fundamental and general to our criminal system . . .
>
> "The seriousness of the Court's judgment is that no one suggests that any course held promise of solution of these murders other than to take the suspect into custody for questioning. The alternative was to close the books on the crime and forget it, with the suspect at large. This is a grave choice for a society in which two-thirds of the murders already are closed out as insoluble. . .

17 Apparently, Mr. Justice Jackson felt that the uncontroverted evidence presented a stronger case of coercion in the *Watts* case. Petitioner here had been kept in solitary confinement, in a cell commonly referred to as "the hole."

". . . one serious situation seems to me to stand out in these cases. The suspect neither had nor was advised of his right to get counsel. This presents a real dilemna in a free society. To subject one without counsel to a questioning which may and is intended to convict him, is a real peril to individual freedom. To bring in a lawyer means a real peril to solution of the crime . . .

"I suppose the view one takes will turn on what one thinks should be the right of an accused person against the State. Is it his right to have the judgment on the facts? Or is it his right to have a judgment based only on such evidence as he cannot conceal from the authority, who cannot compel him to testify in court and also cannot question him before? . . .

"Of course, no confession that has been obtained by any form of physical violence to the person is reliable and hence no conviction should rest upon one obtained in that manner. . . . Nor is it questioned that the same result can sometimes be achieved by threats, promises or inducements, which torture the mind but put no scar on the body. If the opinion of Mr. Justice Frankfurter in the *Watts* case were based solely on the State's admissions as to the treatment of Watts, I should not disagree. But if ultimate quest in a criminal trial is the truth and if the circumstances indicate no violence or threats of it, should society be deprived of the suspect's help in solving a crime merely because he was confined and questioned when uncounseled?

". . . If the right of interrogation be admitted, then it seems to me that we must leave it to trial judges and juries and state appellate courts to decide individual cases, unless they show some want of proper standards of decision."

Significant also was a concurring opinion by Mr. Justice Douglas which expressed a view, apparently not finding sympathy among any of the other Justices but which has provoked considerable discussion, that the mere fact of unlawful detention should vitiate a confession obtained during such period.[18]

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18 Watts v. Indiana, supra, p. 57.

Mr. Justice Black concurred separately in each of the cases solely upon the authority of the *Chambers* and *Ashcraft* decisions. Apparently, Mr. Justice Black, while agreeing in result, was not ready to acquiesce in the sentiments expressed by Mr. Justice Frankfurter, and joined in by Justices Murphy and Rutledge: "Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation."

. . . . .

These are the cases to date. Thus, from *Brown v. Mississippi, supra,* a clear case of physical violence used in coercing a confession, the decisions have progressed to a point where it would seem that a presentation to the Court in a "confession case" of uncontroverted evidence of unlawful detention, plus prolonged questioning, might well be sufficient to provoke a reversal. Of course a usual and almost inevitable incident of unlawful detention is the absence of counsel; this negative aspect has been present in each of the cases reversed. Too, the Court has attached peculiar significance to the position of the accused during the questioning as an "underdog," thus making important a consideration of the number of questioners, the surroundings, the facilities afforded the accused for comfort. In this latter respect, however, it has been clear since the *Ashcraft* decision that actual threats are not a necessary element to warrant reversal; nor is it necessary that the defendant be classed "ignorant."

Further, it is to be noted that the amount of evidence of guilt existing apart from the confession will not consciously affect the Court's determination; also, that, though the Court expressly acts only upon uncontroverted evidence, it will not hesitate, as in the *Malinski* decision, to draw strong inferences even from the comments made upon the trial.

This is about the extent to which the determining factors can be classified under the present decisions. At best, the criteria are vague. However, the decisions have reached a point where it seems fairly predictable that greater exactness will shortly be demanded. The case must soon arise which will compel the

Court to take a definite position as to the limits of this doctrine. In this respect, it should be noted that Justices Murphy and Rutledge, who joined in the majority opinions in the recent five-four reversals, are no longer on the court.

Theory of the Decisions

In view of such conflict in the Court in these latest decisions it is difficult, if not impossible, to formulate accurately the present theory of the law. The conflict is not superficial, but basic, and not apt to be readily resolved. Manifestly, the differences which have provoked the Justices to these opinions are not merely as to the effect which their decisions in this field will have upon state administration of criminal justice, but as to the very basic concept of what constitutes due process in this type of case. In *Lisenba v. California, supra* the Court seemed to make it clear that the test to be applied by them in discovering whether due process had been present was divorced from the process used by the state courts in deciding the admissibility of the confession. The Court said: "The aim of the rule (used by the *state* courts) that a confession is inadmissible unless it was voluntarily made is to exclude *false* evidence . . . The aim of the requirement *of due process* is not to exclude false evidence, but to prevent fundalmental unfairness in the use of evidence *whether true or false*" (p. 236; italics supplied). Thus a rule was announced which, however vague, was capable of formulation. One will search in vain, however, to find this rule being uniformly applied in the opinions. Thus, certainly, Mr. Justice Jackson is not talking about "fundamental unfairness" when he says in *Watts v. Indiana, supra,* "But if the ultimate quest in a criminal trial is the truth and if the circumstances indicate no violence or threats of it, should society be deprived of the suspect's help in solving a crime merely because he was confined and questioned when uncounseled?"

If, however, the majority of the Court, at least, is concerned not with the trustworthiness of the confession but with the freedom of the accused to confess or not to confess, how may we reconcile this with other tests of due process which have been applied by the Court? Apart from any considerations of the

Fourth Amendment, apparently it is not "fundamental unfairness," such as will vitiate a state conviction, for the police officers to break into a man's home in the middle of the night and obtain any form of incriminating evidence.[19] Of course, this evidence is a true indication of guilt, while a coerced confession may be a falsehood. But, the Court says in the confession case that they are not concerned with the truth or falsity of the confession. Admittedly, the *act* of unlawfully detaining a man to coerce a confession from him is a violation of due process. So, too, is the act by the police of breaking into a man's home to obtain evidence. When the evidence obtained in these two cases is introduced into the trial, however, and a conviction is procured, the former is reversible for "fundamental unfairness," the latter is not. In the latter case, the Court says we will leave the accused to his private rights.[20]

It is submitted that this distinction as a measurement of degree is not logically justified unless the reliability of the evidence is considered.

To point this up: assume the case of a guilty man, who by admittedly brutal and coercive methods is induced to confess; the confession is then used only to garner the evidences of his guilt, the confession itself not being introduced or referred to at the trial. Would the Supreme Court reverse a conviction so obtained? From the language of the Court in the *Malinski* case it seems probable that this answer would be "no." This being so, wherein lies the difference in fairness as such? The difference would seem to be only in the *type* of evidence introduced, which brings us back to the question of reliability. If on the other hand, the Supreme Court *would* reverse the conviction in the hypothetical case just posed, such a decision could only be justified by drawing an arbitrary line between force directed against one's person and force directed against one's property in the case of breaking into one's house, both eliciting the same evidence which is introduced on the trial in the same manner.

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19 Wolf v. Colorado, 338 U.S. 25.

20 Wolf v. Colorado, supra, p. 31.

At best, it seems clear that evidentiary reliability is so interwoven with the question of the freedom of the accused to confess or not, as to demand a role, though tacit, in the Supreme Court's application of due process to these situations. To date, however, the majority of the Court has refused to make this concession.

Further Considerations

Although beyond the scope of this article, it should be noted that a parallel situation was developing in the federal courts at this time. In 1942, in *McNabb v. U.S.*, 318 U.S. 332, and later redefined in *Upshaw v. U.S.*, 335 U.S. 410 (1949), the Supreme Court reversed "confession convictions" obtained in federal courts *solely* because there was undue delay in arraignment in violation of Rule 5a of the Federal Rules of Criminal Procedure. Such reversals were not based upon constitutional grounds, but upon the broader ground (inclusive of due process or not) of the supervisory power of the Court over the federal administration of justice. This caused speculation that the Court might apply the doctrine, *as due process,* to convictions in the state courts. Except for Mr. Justice Douglas' concurring opinion in *Watts v. Indiana, supra,* however, there has been no suggestion of this by the Court, although, to date, the Court has not been confronted by a state of facts which would force them to consider the problem.

Nevertheless, unlawful detention has certainly been an element considered by the Court in applying the test of "fundamental unfairness." An interesting case upon the question as to whether this element was present has recently been decided by the New York Court of Appeals: *People v. Perez,* 300 N. Y. 208 (1950), in which re-argument was ordered so that the Court might reconsider the case in light of the *Watts, Turner,* and *Harris* decisions, *supra.* In the *Perez* case, the defendant was convicted of a felony-murder. The body of the victim was found in her apartment, which had been burglarized. Death was due to stabbing and strangulation. Three days later, after violently resisting

arrest, the defendant was apprehended as he emerged from a pawn shop, where admittedly he had just attempted to pawn a fur coat belonging to the deceased. Later, he admitted pawning most of the articles stolen from the apartment. These articles were subsequently recovered, along with a screw-driver, which could have been the murder weapon. The defendant was not immediately arraigned as required by §165 of the New York Code of Criminal Procedure but was held and questioned continuously for twenty-four hours during which time he told many conflicting stories. He was then committed as a material witness in lieu of $50,000 bail. During the commitment proceeding he was assigned a lawyer from the Legal Aid and told that he might contact him; however, later during the commitment, when he attempted to phone the attorney, he was informed by a jailor that he was being held incommunicado, though no complaint was made about this to his family or the District Attorney until the time of his trial.

As a "material-witness" the defendant was held until he confessed, some five days later, during which time he was subjected to frequent and prolonged questioning. On the fifth day he was confronted by his wife who begged him to tell the truth, whereupon he "broke down" and confessed. It was not until this time that he was arraigned.

Upon the trial, the defendant took the stand, repudiated his confession, denied that he had ever been in the victim's apartment or that he killed her. He asserted that he had been stripped of his clothes, brutally beaten and, except for two drinks of water, was denied food and drink during his detention. This was controverted by the police officials.

On appeal, defendant contended that the prolonged interrogation rendered his confession inadmissible and, therefore, constituted a denial of due process. The majority, in affirming the conviction, held that since his commitment as a material witness was *lawful,* this contention could not be sustained. Defendant

also challenged the trial court's refusal to charge that the jury might consider his detention in the interval between his arrest and arraignment in determining whether the confession was voluntary.[21] The Court again held that since the detention as a "material-witness" was lawful the trial court properly refused the request to charge.

Justice Desmond, in a dissenting opinion in which Chief Justice Loughran concurred, points out that a material witness statute is intended only to guarantee the presence of a witness at the trial, and not to take away from the witness all protection against "third-degree" questioning as a suspect and allow the police to hold him incommunicado. Consequently, he felt the detention was illegal and that the jury should have been informed of this fact in determining the question of voluntariness.

As can be seen from both the majority and minority opinions, the use of a material witness statute in the manner employed in the *Perez* case presents a complication in the "confession cases." It is interesting to note that the majority of the New York Court of Appeals distinguished this case from the *Watts, Turner* and *Harris* cases, *supra,* in one way by saying that the states in which those cases arose had prompt arraignment statutes and that the suspects were not immediately arraigned; while in the *Perez* case, Perez was properly committed as a material witness, after a hearing, and his subsequent detention was lawful. Assuming that there are no other factual differences in these cases, can calling a suspect a material witness make an act lawful in one state, while in other states, which do not have this type statute, the same act would be unlawful? Does due process vary, depending upon the individual state laws; or does it apply equally to every citizen in the land?

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21 In denying this request to charge the trial judge said: "According to the testimony in this case the defendant was arraigned almost immediately after he made his confessions, wasn't he?"

Before further discussion, we should examine the material witness statute in question. Section 618b of the New York Code of Criminal Procedure provides, in substance: whenever a judge of a court of record is satisfied, by proof on oath, that a person is a material and necessary witness for the people in a criminal action or proceeding pending in any of the courts of the state, he may, after an opportunity be given to such person to appear and be heard in opposition thereto, order such person to enter into an undertaking, with sureties, to the effect that he will appear and testify and upon his neglect or refusal to comply, the judge may commit him until he complies or be legally discharged. The New York courts have interpreted a grand jury hearing under the caption of *"People v. John Doe"* (in other words, a mere investigation) to be a "proceeding pending" within the meaning of the statute.[22] Such an interpretation, by coincidence or not, plays directly into the hands of those who wish to extort confessions; and furthermore, completely eradicates the need for unlawful holding. The usual reason for unlawfully holding a man is the absence of sufficient evidence on which to arraign him when guilt points in his direction and the authorities want time to unearth more evidence, or, if possible, "break down" the defendant and secure a confession. As previously indicated this is not necessary when a statute is interpreted as here; it is only necessary to have the suspect committed as a material witness and, since there is not yet a defendant in custody who is entitled to a speedy trial, the duration of the "lawful" detention is virtually unlimited. As a practical matter, it would seem that an arraignment statute such as § 165 of the New York Code of Criminal Procedure has become obsolete, and the "taboo" of the United States Supreme Court on unreasonable delay in arraignment is circumvented.

It is submitted that the use of a material witness statute in the manner employed in the *Perez* case should have the same

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22 Peo. ex rel Nuccio v. Warden, 182 Misc. 654. See also: Peo. v. John Doe (Re Bernoff); 261 App. Div. 503; Peo. v. John Doe (Re Rubenstein), 259 App. Div. 921; Peo. v. John Doe (Re Workman), 259 App. Div. 1027.

effect in determining the voluntariness of a confession as would any other unlawful detention. Justice Desmond adheres to this view in his dissent in the *Perez* case: "If this simple device of treating an arrested person as a material witness legalizes any subsequent period or otherwise unlawful detention, it will indeed be a useful one for those who are impatient with the curbs of § 165" (p. 221).

EMERGENCY BUSINESS SPACE RENT CONTROL LAW

Purpose

The declaration of a public emergency is set forth in Section 8551 McKinney's Unconsolidated Laws and provides, in substance, that as long as prevailing conditions brought about by war continue, they result in making freedom of contract an illusory concept. To prevent unjust, unreasonable and oppressive leases of space covered by the law, an emergency rent, determined as of July 1, 1944, or as otherwise specified in the law, shall exist for the duration of the emergency. The statutory provisions are, of course, a limitation upon the landlord's right to contract freely and thus the act will be strictly construed to embrace only what the legislature intended, yet liberally applied to effectuate that intent.[1] The provisions are inapplicable to cases which fall outside the purpose and intent of the statute.[2] It has been held that leases executed before the emergency date, are not regulated by the statute.[3] However, the tenant is protected when such leases expire, since he then becomes a statutory tenant.[4] Leases remain in full force and effect for most purposes, and the relationship between the lessor and lessee continues as it existed prior to the enactment except for modifications as to duration of the tenancy and amount of

1 Matter of McGrath, 186 Misc. 27, 58 N.Y. Supp. 2d 876 (1945); Kristel v. Steinberg, 188 Misc. 500, 69 N.Y. Supp.2d 493 (1947).

2 White Way Arcade v. Broadway Turtle King, Inc., 273 App. Div. 281, 285, 77 N.Y. Supp. 2d 709, 712 (1948) holding that tenant, who is motivated solely by desire to be relieved of burdensome lease, cannot induce landlord to terminate lease by agreeing to vacate the premises and then remain in possession. See also Section 8558(g) McK. Unconsol. Laws.

3 Ranaho Corporation v. Morse, 186 Misc. 334, 61 N.Y. Supp, 2d 545 (1946).

4 86 Near Second Avenue Corporation v. Fennekohl, 186 Misc. 726, 734, 61 N. Y. Supp. 2nd 167, 174 (1946) holding, a modification of lease in 1942 and in force on "freeze date" fixes the base for emergency rent. But cf. Auswin Realty Corporation v. Kirschbaum, 270 App. Div. 334, 59 N.Y. Supp. 2d 824 (1948) as to this situation.

rent.[5] Moreover, these regulations do not affect the provisions relative to summary proceedings but merely impose new conditions precedent with which a landlord must comply before he can bring such proceedings.[6]

Landlord-Tenant Relationship

Section 8552, McK. Unconsol. Laws sets forth and defines the terms of "landlord"[7] and "tenant"[8] in a manner necessarily extensive. A trustee in bankruptcy proceedings is a tenant when the privilege of the debtor, entitled to possession, passes to him.[9] A licensee, to come within the definition, must be more than one who merely has right to do an act upon premises;[10] he must be a licensee of a rentable area and have exclusive possession.[11] Even a tenant must have possession of the premises as the purpose of the statute is to protect one actually occupying and using property from extortionate demands of his landlord.[12] A subtenant formerly did not come within the

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5 Cortlandt and Dey Streets Corp. v. New York Lerner Co., 84 N.Y. Supp. 2d 9 (1948); 551 Fifth Avenue Inc. v. Masch, 185 Misc. 142, 57 N.Y. Supp. 2d 554 (1945).

6 Empire State Inc. v. Graceline Handbags Inc., 192 Misc. 679, 83 N.Y. Supp. 2d 574 (1948).

7 An owner, lessor, sublessor, receiver, trustee, executor, assignee or other person *receiving* or *entitled* to *receive rent for the use or occupancy* of the whole or a part of any business space.

8 A lessee, sublessee, licensee, or *other person entitled to the use or occupancy* of the whole or a part of any business space.

9 Finn v. 415 Fifth Ave. Co., 153 F. 2d 501 (C. C. A. 2d) (1946).

10 Kaypar Corporation v. Fosterport Realty Corporation, 69 N. Y. Supp. 2d 313 (1947); Kesbec Inc. v. City of New York, 67 N.Y. Supp. 2d 900 (1946).

11 Isaacson v. Ken Drug Corporation, 85 N. Y. Supp. 2d 253 (1948).

12 44 West Fourteenth Street Co. v. Chanlan Corporation, 73 N. Y. Supp. 2d 95 (1947); but see Gasoff Realty Corporation v. Serval Food Exchange, 77 N. Y. Supp. 2d 58 (1947).

protection of the emergency laws unless he subleased the entire premises.[13]

A receiver in a mortgage foreclosure is generally considered to be an officer of the court and property in his possession to be in *custodia legis.* According to the emergency laws, a receiver may be a landlord and accord a person the status of a tenant entitled to benefits of the laws.[14] An assignment by a landlord of *a lease* with the tenant does not make the assignee the new landlord where it is an attempt to reduce tenant's status to that of a subtenant.[15] The definition of landlord, as well as that of tenant, as set forth in the act, is subject to the other provisions of the statute.[16]

It cannot be said with any positive assertion, that only the conventional relationship of landlord and tenant will bring the parties within the purview of the laws. In most cases, the circumstances involved will determine whether the court will hold that the purpose and intent of the legislature is being fostered, and that no inequitable, vexatious or untoward results are being reached, if a particular person is held to be within, or without, the protection of the provisions established.[17]

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13 Irving Trust Co. v. One Thirty-One West Forty-Second Street Corporation, 71 N. Y. Supp. 2d 838 (1947); 440 Thirty-Seventh Street Corporation v. Rosoff, 84 N. Y. Supp. 2d 16, 20 (1948). For a holding that landlord cannot make subtenant a statutory tenant and thus recover emergency rent, see Gasoff Realty v. Berger, 188 Misc. 622, 69 N. Y. Supp. 2nd 46 (1947). Sec. 8554 (4) (b) McK. Unconsol. Laws now provides that a sublessee or subtenant is subject to the obligations and liabilities of a tenant and the landlord may receive rent from him as though he were the tenant; provided that he shall be liable only for a proportionate amount if he occupies less than the entire space. 4(c) also allows landlord, after tenant has vacated the premises to offer entire space to all sublessees at the rent payable by tenant. If anyone fail to lease for one year, the landlord may remove such person.

14 East Brooklyn Savings Bank v. Hickman Realty Corporation, 272 App. Div. 683, 74 N. Y. Supp. 2d 707 (1947).

15 See Mitchell v. McClellan, 82 N. Y. Supp. 2d 772 (1948).

16 McK Unconsol. Laws, § 8552; Blitzkreig Amusement Corp. v. Rubenstein Bros. Drinks, 184 Misc. 975, 55 N. Y. Supp 2nd 379 (1945).

17 E.g. compare DaCosta v. Hamilton Republican Club, 187 Misc. 869, 65 N.Y. Supp. 206 (1946) with Stergman v. Singer Tobacco and Confectionery Co., 72 N. Y. Supp. 2d 560 (1947) (mortgagor in possession, foreclosure); Viro Realty Corporation v. Belmont, 275 App. Div. 283 (1949); see e.g. the cases cited *supra* note 9, involving the situation of licensees.

Business Space and Leases

The statute sets forth the space covered.[18] The dominant motive of the law is to protect tenants of office and retail spaces in buildings other than spaces located in lofts.[19] Meeting rooms. other than in hotels, are within the scope of the act when occupied by an organization as a tenant.[20] Places of public assembly, which are specifically excluded from the meaning of business space, include theatres, sports areas and stadiums and meeting rooms or exhibition halls.[21]

The lease agreements for terms of more than four months in any one calendar year concerning *presently occupied property,* only, are covered by the law. If the tenant vacates the premises, the property is, then, no longer regulated.[22]

In addition, the provisions of the act are inapplicable to any new building in course of construction, or completed, on or after March 30, 1946.[23]

Landlord's Rights and Duties

Other than his general statutory prerogative to seek increased rent or possession of the property, the landlord has miscellaneous rights and duties designated by the law.

Primarily a landlord must furnish his tenant with a statement of the emergency rent within twenty days after the effective date of the law if the tenant is in possession, or 20 days

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18 All rental space other than (1) commercial space as defined, L. 1945, c. 313, as amended; (2) dwelling space generally; (3) piers and docks, and (4) places of public assembly.

19 Matter of McGrath, 186 Misc. 27, 58 N. Y. Supp. 876 (1945) (parking lot); Hudson and Manhattan R. Co. v. Stangler, 75 N. Y. Supp. 2d 26 (1947).

20 Papricus Inc. v. Woodside Royal Social and Athletic Club, 77 N. Y. Supp. 2d 664 (1948).

21 McK. Unconsol. Laws, § 8552(b); but cf. Papricus Inc. v. Woodside Royal Social and Athletic Club, *supra* note 20.

22 McK. Unconsol. Laws, § 8562. This shows a tendency towards decontrol and possibly the emergency may be declared ended within a few years. The four months' limitation covers resort premises.

23 McK. Unconsol. Laws, §8564. This encourages the new construction which hopefully will eventually alleviate the present conditions.

after a new lease is created, if the tenant takes possession after the effective date. If the property is not used as of June 1, 1944, then the notice must be given twenty days after the rent is fixed by arbitration, agreement, or by the supreme court.[24] The failure to serve such notice suspends the right to collect rent, but after it has been served the full amount due is collectible.[25] This notice is not *ipso facto* a demand for increased rent as the law itself did not automatically establish the emergency rent as the rent presently payable.[26]

A landlord who wilfully demands or accepts a rent in excess of emergency rent or rent fixed pursuant to Section 8554 of this act shall forfeit one month's rent. This involves a specific intent to violate the law and does not apply where there is merely a mistake in the exercise of judgment.[27]

An action in ejectment cannot be brought by a landlord, as that would circumvent provisions of the statute.[28] A landlord is not liable for damages for failure to give possession to a new tenant where a tenant remains in possession pursuant to statutory mandate as performance of essential elements of the lease are rendered impossible.[29] It is allowable to terminate a monthly tenancy by proper notice and then seek the emergency rent,[30] but notice to terminate may not be given *during* a rent-paid period and, similarly, a demand for possession, to terminate a statutory tenancy, cannot be made under such circumstances.[31]

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24 McK. Unconsol. Laws, §§ 8553, 8552 (c). It may be questioned whether notice is required to a new tenant taking possession today (§ 8562).

25 McK. Unconsol. Laws, §8553. Manufacturers Trust Co. v. Arvin Chemists, 60 N. Y. Supp. 2d 504 (1946).

26 1780 Broadway Corporation v. Stoutenburgh, 64 N. Y. Supp. 2d 537 (1946).

27 McK. Unconsol. Laws, § 8554 (5). Manufacturers Trust Co. v. Arvin Chemist Inc., *supra,* note 25.

28 Scalzitti v. Nobe Caterers Inc., 193 Misc. 683, 85 N. Y. Supp. 2d 26 (1948).

29 McK. Unconsol. Laws, § 8560. Bond Stores v. Marbridge Building Co., 185 Misc. 1043, 58 N. Y. Supp. 2d 13 (1945).

30 President and Directors of Manhattan Company v. Albert, 193 Misc. 64 (1948).

31 Empire State Inc. v. Graceline Handbags, 192 Misc. 679, 83 N. Y. Supp 2d 574 (1948).

Any cause of action created by the emergency business space rent control law is governed by a one year statute of limitation except a cause accruing prior to April 11, 1949. The latter became barred one year from that date.

Rent

Rents are frozen as of the time provided for in the law. It is the rent reserved or payable under any lease or tenancy *in force* on June 1, 1944, plus fifteen per cent of such rent.[32] This includes only the rent agreed upon as of that date, and not the amount actually paid.[33]

If the space is not occupied or used as of such date the emergency rent shall be the reasonable rent fixed by agreement, arbitration or by the supreme court, and this includes any property wherein the unit of space has been changed since the freeze date.[34] Reasonableness in such case, when fixed by the supreme court, is based on rent of *comparable space* as of the freeze date. If an agreement is reached by the parties, it must explicitly establish what such reasonable rent was at the above date.[35] The statute also provides that in case of any lease entered into before June 1, 1939, and which has been continuously in force, a rent exceeding emergency rent may be fixed by written agreement or by application to the supreme court.[36]

The detailed method of obtaining rent in excess of the emergency rent is set forth in Section 8554. The rent may be fixed according to the *fair rental value* of the tenant's business space not to exceed a fair and reasonable proportion of the gross rentals from all of the business space in the entire building. A net annual return of eight per cent on fair value of entire property

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32 McK. Unconsol. Laws, § 8552 (c).

33 See Manufacturers Trust Co. v. Arvin Chemists, *supra* note 25.

34 McK. Unconsol. Laws, § 8552 (c). Sophe v. Tristano, 86 N. Y. Supp. 2d 354 (1948).

35 Ibid.

36 McK. Unconsol. Laws, § 8552 (c).

including land shall be presumed reasonable.[37] In the alternative, a net annual return of six per cent on the fair value of the entire property plus two per cent of the value of land and buildings is allocated to store and office space respectively. The fair rental value per square foot of the appropriate space is determined therefrom or by stipulation of the parties. The rent fixed cannot exceed fifteen per cent more than the rent being paid by the tenant, nor increased to any greater extent within any period of twelve months.[38]

Under the first method, gross rental includes only the rent actually received by the landlord and not that agreed upon.[39] Insofar as any leases exceed the emergency rent, landlord has burden of proof to show they are reasonable,[40] but it is not necessary that he seek a reasonable rent from all of the tenants.[41] In both of the above proceedings, it is a requisite that the landlord serve a verified bill of particulars upon the tenant, if demanded.[42]

In lieu of the above described methods, the landlord and tenant may both sign an agreement fixing the reasonable rent.[43] It is not imperative that the tenant be in possession to make such an agreement.[44] Substantial compliance with the conditions set forth in Section 8554 (3) is sufficient and the terms need not be on

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37 An independent investigation by an arbitrator shall be grounds for vacating an award. 290 Park Avenue Inc. v. Fergus Motors, 275 App. Div. 565, 90 N. Y. Supp. 2d 613 (1949).

38 McK. Unconsol. Laws, § 8554.

39 Matter of Court Square Bldg. Inc. v. City of New York, 298 N. Y. 380 (1949). (Some tenants were not subject to emergency rent laws.)

40 Dworan v. Milgrim, 61 N. Y. Supp. 2d 352 (1946).

41 Application of Topp, 87 N. Y. Supp. 2d 344 (1947).

42 McK. Unconsol. Laws. § 8554 (1). Matter of Court and Remsen Building Corporation, 196 Misc. 416 (1949). Among the items to be set forth are: gross income of entire building, names of tenants and rent charged, consideration paid for property, assessed value, cost of maintenance and type of services.

43 McK. Unconsol. Laws, § 8554 (3). The amount of emergency rent, a statement that landlord advised tenant he could pay emergency rent until the lease is modified and that tenant could cancel agreement within sixty days, must be submitted.

44 L. 1949, c. 535; contra (before amendment) 82-10 Roosevelt Ave., Inc. v. Sacks, 93 N. Y. Supp. 2d 228 (1949).

an instrument separate from the lease.[45] As long as such agreement remains in effect, subsequent proceedings to fix reasonable rent may not be instituted;[46] moreover, the agreement fixing the rent for the emergency is not reviewable by the courts on the question of reasonableness.[47] This is true despite the duration of the lease and until a new application is made to the supreme court to fix the rent. Any existing lease wherein the rent is less than the emergency rent precludes landlord from seeking increased rent.[48] Special provisions were necessary for those leases involving variable or graduated rents.[49] The former measures rent according to the volume, or other criteria of volume, of tenant's business. Any fixed minimum amount is subject to the emergency rent law as though it were the only rent. The variable rent provisions continue without change, thus making the terms of the lease the controlling factor and the rent payable on the freeze date is immaterial.[50]

If leases for more than three years contain rental stipulations on a graduated scale, their terms govern for the duration of the lease. It is immaterial that they do not provide for graduated changes to be affected subsequent to the freeze date and before the end of the lease; nor do any modifications in effect on freeze date determine the emergency rent.[51]

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45 Roof Health Club v. Jamlie Hotel Corporation, 271 App. Div. 481, 65 N. Y. Supp. 2d 720 (1946).

46 McK. Unconsol. Laws, § 8554 (6). Torah Toris Moishe Inc., 274 App. Div. 1069, 85 N. Y. Supp. 2d 827 (1949); Application of Moore, 194 Misc. 718, 88 N. Y. Supp. 2d 367 (1949).

47 Siegal v. Gottlieb, 69 N. Y. Supp. 2d 301 (1947).

48 McK. Unconsol. Laws, § 8555. Where tenant was honestly mistaken and landlord not prejudiced, tenant was allowed to exercise option to renew lease and therefore come within this provision. Application of Topp, 81 N. Y. Supp. 2d 244 (1947).

49 McK. Unconsol. Laws, § 8563.

50 Effective date of amendment creating the exception to variable rents is March 1, 1945. King Arthur Restaurant v. London Terrace Inc., 273 App. Div. 233, 76 N. Y. Supp. 2d 452 (1948).

51 City Bank Farmers Trust Co. v. Seconset Corporation, 274 App. Div. 112 (1948). § 8563; as to situation before 1946 amendment see *supra,* note 4.

Leases with options for renewals are considered one lease when the option is exercised, and may thus constitute leases with rent in a graduated scale.[52] When leases with provisions for graduated rent terminate, the rent is based on the most nearly *comparable business space* as of the date an agreement is reached or an application to the supreme court is made.[53]

In any action to recover rent, it shall be a defense that such rent is in excess of the emergency rent or rent fixed pursuant to Section 8554. The excess is uncollectible. If tenant sues to recover the excess paid, he must show he actually occupies the premises.[54]

Recovery of Possession

Set forth in Section 8558 are eleven separate conditions whereby a landlord may gain possession from a tenant. As a general rule, the landlord cannot remove the tenant if he continues to pay the proper rent even though the lease has expired or an agreement has been entered into and is inconsistent with the rent control law. The following situations are excepted:

a. Where there is a refusal to allow access to landlord, of any part of the business space, for the purpose of inspection or showing space to prospective purchaser, unless the lease contains provisions authorizing the exclusion.

b. Where there is a violation of a substantial obligation and a failure to cure such violation after a written notice by landlord demanding that the violation cease; or permitting a nuisance or illegal use of premises.

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52 Matter of Harvey Holding Corporation, 297 N. Y. 113, 75 N. E. 2d 619 (1947).

53 McK. Unconsol. Laws, § 8563 provides that the minimum rent of a variable lease is subject to all the provisions of *this section.* Though this would be the emergency rent, any increase after the lease terminates would have to be based on comparable business space and not according to § 8554. Contra, Cortlandt and Dey Strets Corporation v. New York Lerner Corporation, 84 N. Y. Supp. 2d 9 (1948) (before amendment).

54 McK. Unconsol. Laws, § 8557. Jaylo Realty Corporation v. Bonbar Realty Corporation, 73 N. Y. Supp. 2d 441 (1947).

c. Where the landlord seeks to recover premises to demolish the building and construct a new building according to plans approved by proper authorities.[55]

d. Where the landlord owning an enforceable right to take possession as of June 24, 1945, seeks possession for his personal use of premises, or owner of property after that date seeks possession for his personal use or for use of stockholder owning ninety per cent stock in a corporation which owns the business space, or possession is sought for a subsidiary corporation of which the landlord or other owner owns at least ninety per cent of the stock; or lessee of entire building for a term of twenty-one years or more seeks possession for his personal use.[56]

e. Where there is a refusal by tenant to enter into a subsequent lease which is similar to the existing lease.

f. Where the property is needed to carry out housing or a rehabilitation project.

g. Where an agreement is in writing by which the tenant promises to terminate the occupancy.

h. Where on or before January 24, 1945, the landlord has the right to possession of the entire building for term of at least ten years, or the owner of ninety per cent of corporate stock, or the corporation in which such stockholder owns ninety per cent of stock, owns or has the lease for at least ten years; and such landlord, stockholder or corporation seek to recover possession for personal use; or a lessee under a lease for at least ten years, demands possession of the building for his personal use.

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55 This has been construed to mean *complete* demolition and construction of a *completely new* and *separate* building. Empire State Inc. v. Graceline Handbags, 192 Misc. 679, 83 N. Y. Supp. 2d 574 (1948). In a subsequent case involving the same parties, it was held that the size of the separate building is immaterial, 87 N. Y. Supp. 2d 319 (1949).

56 But cf. Blitzkreig Amusement Corporation v. Rubenstein Bros. Drinks, 184 Misc. 975, 55 N. Y. Supp. 2d 379 (1945) (before amendment, L. 1950) (lessee of only part of premises). "Legislature intended to restrict a lessee-landlord in removal of his tenant . . . under subdivision (d) . . ." (Id. at 982.)

i. Where a labor organization owning ninety per cent of stock in corporation owning the entire premises, seeks possession for personal use.

j. Where charitable and religious institutions seek possession for personal use.

k. Where a landlord having accepted bona fide offer from prospective tenant delivers to tenant a copy of the same lease for a store at rental of $7,500 per annum or more, for a term of not less than ten years, and tenant refuses to accept the lease within specified time.

l. Where an assignee of a lease, which was executed prior to January 24, 1945, and was for at least ten years, seeks possession for his personal use.

Under subsection (b), it is a jurisdictional defect to fail to allege and prove the giving of notice to a tenant to cease violating a substantial obligation. He must be given a reasonable opportunity to amend the defects.[57]

In the situations as outlined above, it should be noticed that recovery of the premises from the tenant must be for the immediate and personal use of the person designated, except in subsections (a), (b), (c), (e), (f) and (g). Damages are awarded to the tenant if the premises are not occupied by the person gaining possession and the business is not conducted therein within a specified time, or if the premises are leased to some other person within a year after dispossession of the tenant. Under subsection (c), damages are also awarded if construction is not commenced within ninety days, or, having been started, it is unreasonably delayed. A mere demand for possession is not a sufficient ground upon which a cause of action under the statute may be based, but it may be the basis for an action of fraud.[58]

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57 Frankel v. Post, 272 App. Div. 334, 70 N. Y. Supp. 2d 745 (1947) (notice to vacate only); Phaeton Realty Corporation v. Hugo Gnaur and Son Inc., 187 Misc. 1063, 66 N. Y. Supp. 296 (1946).

58 Wigod v. Janina Realty Corporation, 275 App. Div. 717 (1949).

In every case, except as it is otherwise provided for in subsections (a), (b), (e), (f) and (g), recovery of the business space must be sought in good faith. A mere assertion of good faith will not overcome a contrary presumption which arises when the landlord fails to use the premises.[59] Of course, good faith is a question of fact for the jury[60] and a valid excuse for failing to occupy the premises will nullify the imposition of any penalties, as in such a situation, they would be unjust and unwarranted.[61] The basic premise is *good faith* and compelling necessity need not be shown.[62]

When recovery is sought by a corporate owner for the use of a stockholder under subsection (h), it is necessary to show that the corporation has at least an equity of twenty-five per cent of the purchase price of the property sought.[63] In some cases a stockholder uses a corporation as a conduit of title, but this will not affect his claiming possession under Section 8558(d) if he actually contributed the required amount to obtain an equity of at least twenty-five per cent of the purchase price.[64] Under subdivision (k), it is conclusively required that the landlord do more than merely offer a new lease to the tenant; there must be a simultaneous *delivery* of a copy of the lease to the tenant in possession.[65]

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59 Perone v. Zora Realty, 192 Misc. 605 (1948).

60 J. Simpson & Co., Inc., v. Ronald-Leeds Inc., 68 N. Y. Supp. 2d 628 (1947).

61 United Dye Works v. Scifo, 190 Misc. 959, 76 N. Y. Supp. 2d 590 (1947).

62 Kruger v. Graubard, 188 Misc. 82, 68 N. Y. Supp. 2d. 648 (1946).

63 McK. Unconsol. Laws, § 8558 (d), (h). Though (h) (2) does not require corporation to have twenty-five per cent equity in property, it has been held that such must be shown, as it is similarly necessary to show in subdivision (d). 244 West 27th Street Corporation v. Lieberman, 272 App. Div. 725, 74 N. Y. Supp. 2d 763 (1947).

64 Goldberg v. Friedman, 187 Misc. 445 (1946); Manufacturers Trust Co. v. Permut, 191 Misc. 754 (1948).

65 McK. Unconsol. Laws, § 8558 (k). Maidman v. Scheinberg, 196 Misc. 484 (1949).

If there is an existing lease, it is not affected by any of the provisions of Section 8558 unless the privilege is reserved to terminate the lease for reasons which would not preclude the remedies afforded by the subdivisions of this section.[66]

In any case where the petitioner seeks to recover possession of any business space for the *non-payment of rent,* it is essential that he allege and prove that the rent is not greater than the emergency rent, or such rent as has been fixed pursuant to Section 8554, and that the services have not diminished since the effective date of the existing lease.[67]

P. L. M.

66 Subdivisions d, h, i, j, k and l contain express provisions to this effect.

67 McK. Unconsol. Laws, § 8556.

SOME STATUTORY MODIFICATIONS OF THE COMMON LAW OF CONTRACTS IN NEW YORK

It is well established as a general proposition in Anglo American law that in order to impose a legal duty on a promisor there must be consideration given for the promise. That is, there must be bargained for and given in exchange for the promise, an act, a return promise, a forbearance, or, the creation, modification or destruction of a legal relation. Consideration need not be given by the promisee, but may be rendered by a third person, so long as it is that which is asked for by the promisor.[1] The purpose of the writer is to point up the New York statutory exceptions to this doctrine.

As far back as 2900 B.C., a promise under seal, was enforceable because of the presence of the seal.[2] As the action of assumpsit evolved, the theory developed that a seal upon an instrument imparted an irrebutable presumption of consideration. In an action on a sealed instrument failure of consideration, total or partial, could not be pleaded as a defense,[3] nor could a defendant avail himself of the defense of fraud in the inducement.[4]

The sanctity of the seal thus indirectly sanctioned fraud and other inequitable practices. Probably for these reasons it was provided in 1828 that the seal should be only "presumptive evidence of a sufficient consideration which may be rebutted in the same manner, and to the same extent, as if such instrument were

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1 Restatement, Contracts Section 75 (1932).

2 Cochrane v. Taylor, 273 N.Y. 172, 7 N.E. 2d. 89 (1937). Report of Law Revision Commission, Legislative Document, (1936) No. 65, p. 235.

3 Vrooman v. Phelps, 2 Johns. 177 (N.Y. 1807).

4 Vrooman v. Phelps, 2 Johns. 177 (N.Y. 1807). Of course, fraud in the execution could be availed of since then the instrument wouold be void ab initio. (Van Valkenburgh v. Rouk, 12 Johns. 337 (N.Y.1815).

not sealed."[5] This law remained in effect until it was amended in 1876 to read, "a seal upon an executory instrument is only presumptive evidence of a sufficient consideration, which may be rebutted, as if the instrument was not sealed."[6] This statute, with little modification, remained in effect until September 1, 1935.

It should be noted that these statutory changes in the common law refer only to sufficiency of consideration. Thus, it was held in *Cochran v. Taylor*[7] that parole evidence could not be introduced to show absence of consideration for an option under seal which recited it was given for one dollar, the seal raising a conclusive presumption of consideration, the statute merely allowing inquiry beyond the seal as to sufficiency.

The 1935 amendment provided that a seal would not be received as conclusive or presumptive evidence of sufficient consideration.[8] This was amended in 1936 to read that a seal would not be conclusive or presumptive evidence of consideration.[9]

Since September 1st, 1941 the seal has had no legal effect in New York contract law: "Except as otherwise expressly provided by statute, the presence or absence of a seal upon a written instrument shall be without legal effect."[10] The statute of limitations on sealed instruments was, at the same time reduced from twenty to six years.[11]

The common law allowed modification of a sealed instrument only by another sealed instrument.[12] This rule had been modified in New York and prior to the 1941 amendment to the Civil

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5 2 R.S. (1st ed.) p. 406, pt. 3, ch. 7, tit. 3, Section 77.

6 Code of Remedial Justice, Section 840, L. 1876 ch. 448.

7 273 N.Y. 172, 7 N.E. 2d 89 (1937). Accord, Helmick v. Probst, 170 Misc. 284, 9 N.Y. Supp. 2d 975 (1939).

8 L. 1935, c. 708.

9 L. 1936, c. 685.

10 C.P.A. Section 342, L. 1941, c. 329.

11 C.P.A. Section 47, L. 1941, c. 329.

12 Cammack v. Slattery & Bro., Inc., 241 N.Y. 39, 148 N.E. 781 (1925).

Practice Act a sealed instrument could only be modified or discharged by a writing signed by the party to be charged.[13] This last rule was of course, destroyed by the legislative act which felled the seal. It is now provided that an executory agreement shall be ineffective to change, modify, or discharge in whole or in part a written instrument, which contains a provision to the effect that it cannot be orally changed, unless such executory agreement is in writing and signed by the party against whom it is sought to be enforced.[14] Whether this statute shall apply in a given case depends upon the intent of the parties as expressed by the inclusion or exclusion of the statutory clause prohibiting oral change.[15]

The effect of the foregoing sections is to sweep away almost all of the archaic privileges that the common law had for centuries accorded a sealed instrument, to leave the efficacy of the seal remaining only for purposes of authentication of an instrument.

Since the seal had been an extremely useful device for making enforceable agreements for which consideration was not asked, something had to be devised to take its place. As a substitute for the presumptions of the seal, the legislature has provided that, in certain specified instances, an original written promise, or a modification of a valid existing contract, shall be valid notwithstanding the absence of consideration.[16]

An agreement for transfer of stock or bonds is not void or voidable for want of consideration;[17] nor, will any assignment be

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13 1941 Leg. Doc. No. 65 (M); 1941 Report, Recommendations and Studies pp. 512-518.

14 Personal Property Law, Section 33(c) (1), added L. 1941, c. 329, Section 5, as amended by L. 1944, c. 588, Section 7. Real Property Law, Section 282 (1), added by L. 1941, c. 329, Section 4, as amended by L. 1944, c. 588, Section 4. Incorporation of these sections in a contract will not prohibit an oral assignment (Molina v. Barany, 56 N.Y. Supp. 2d 124 (1945). Also, it seems that the parties may by oral agreement abandon a written contract containing the statutory clause (Green v. Doniger, 300 N.Y. 238 (December 1949).

15 Green v. Doniger, 300 N.Y. 238 (December 1949).

16 Personal Property Law, Section 33. Real Property Law, Section 279. Real Property Law, Section 283. Debtor and Creditor Law, Section 243.

17 Personal Property Law, Section 33(1), L. 1936, c. 281.

denied the effect of irrevocably transferring the assignor's rights due to lack of consideration if in writing and signed by the assignor or his agent.[18]

One of the most important of the New York changes involves the method to be used to change or modify an already existing valid agreement. At the common law any change or modification had to be supported by a consideration separate from the original contract.[19] Today the absence of consideration will not invalidate an agreement to change, modify or discharge a contract, providing the agreement is in writing and signed by the party against whom it is sought to be enforced.[20]

The rules of law applicable to an executory accord have also undergone statutory modification. At the common law, the plea of an executory accord was not good either as a defense or as the basis of an action. In order to discharge the old obligation and substitute the new, there had to be satisfaction of the accord. In *Reilly v. Barrett,*[21] plaintiff brought an action to recover damages for personal injuries caused by the negligence of the defendant. As a defense, the latter alleged that he agreed to pay to the plaintiff in full settlement of the cause of action set forth in the complaint the sum of two hundred dollars and had tendered said sum to plaintiff, who had refused it, although defendant continued ready, willing and able to pay the sum to plaintiff. The Court of Appeals sustained a demurrer to the answer on the ground that there was no allegation that the defendant's promise was the act asked for as a satisfaction and therefore the answer was defective as showing only an accord. This situation has been remedied by a statute which provides that an executory accord

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18 Personal Property Law, Section 33(4), added by L. 1941, c. 330, Section 3, as amended by L. 1944, c. 588, Section 5. Real Property Law, Section 279(3), added by L. 1941, c. 330, Section 2, as amended by L. 1944, c. 588, Section 2.

19 Cohen v. Commercial Travelers Mutual Accident Ass'n of America, 47 N.Y. Supp. 2d 402 (1944).

20 Personal Property Law, Section 33(2), added by L. 1936, c. 281, Section 1, as amended by L. 1944, c. 588, Section 5. Debtor and Creditor Laws, Section 243, L. 1936, c. 222. Real Property Law, Section 279(1), as amended by L. 1944, c. 588, Section 2.

21 220 N.Y. 170, 115 N.E. 453 (1917).

in writing and signed by the party against whom it is sought to be enforced will not be denied effect as a defense, counterclaim, or cause of action for the reason that the satisfaction or discharge of the claim is to be performed at a future date.[22] However, if performance is not given according to the terms of the accord, the non-defaulting party may assert his rights under the original claim or under the accord.[23] It is further provided that an offer in writing to accept a given performance in satisfaction of a claim, followed by tender of the performance by the offeree before revocation of the offer, will not be denied effect as a defense, or as the basis of a counterclaim; or action, by the mere fact that such tender was refused.[24]

Also, today, a written instrument purporting to be a total or partial release or discharge of all or part of any claims, demands, debts, obligations, mortgages, liens, or charges upon personal or real property will not be invalid due to lack of consideration or seal.[25] Thus the parties to a valid existing contract may alter or modify that contract gratuitously, freed from the necessity for creating a color of consideration. The formality of writing fulfills the function formerly performed by the seal.

Settled authority in New York, required that new consideration be given to make a promise binding;[26] that is, an act or forbearance performed last week could not support a promise made this week. This rule is now modified by a statute which states that a contract will not be denied validity merely because

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22 Personal Property Law, Section 33(a) (2), added by L. 1937, c. 77, Section 1, as amended by L. 1944, c. 588, Section 6. Real Property Law, Section 280(2), added by L. 1937, c. 77, Section 2, as amended by L. 1944, c. 588, Section 3.

23 Personal Property Law, Section 33(a) (3), added by L. 1937, c. 77, Section 1, as amended by L. 1944, c. 588, Section 6. Real Property Law, Section 280(3), L. 1937, c. 77, Section 2.

24 Personal Property Law, Section 33(b) (1), added by L. 1937, c. 77, Section 1, as amended by L. 1944, c. 588, Section 6. Real Property Law, Section 281(1), added by L. 1937, c. 77, Section 2, as amended by L. 1944, c. 588, Section 3.

25 Debtor and Creditor Law, Section 243, L. 1936, c. 222.

26 Chilcott v. Trimble, 13 Barb. 502 (N.Y.).

the consideration is past or executed, providing the consideration is expressed in writing, is proven to have been given and would be valid consideration but for the time when it was given or performed.[27]

New York has also revised the law relating to options. At common law, any offer not supported by consideration could be revoked by the offeror at any time before there had been due acceptance by the offeree, and it was not material that the offer expressly purported to give the offeree the right to accept until a stated time, or expressly stated that it could not be revoked.[28] This rule has been superseded by a statute which provides that a written offer signed by the offeror, "which states that the offer is irrevocable during a period set forth or until a time fixed, the offer shall not be revocable during such period or until such time because of the absence of consideration for the assurance of irrevocability. When such a writing states that the offer is irrevocable but does not state any period or time of irrevocability, it shall be construed to state that the offer is irrevocable for a reasonable time."[29] Here again a writing has taken the place of the more formal seal.

Consistent with the policy demonstrated by the foregoing statutes is that section of the Real Property Law which states that absence of consideration, if none was intended, will not cause a warranty by a grantor in a duly proved or acknowledged deed of real property, to be denied effect.[30]

It is interesting to note that these statutes, passed to take the place of the now defunct seal, provide that in a proper case the absence of consideration shall not invalidate the agreement. They do not carry on any sacred fictional irrebuttable or rebuttable

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27 Personal Property Law, Section 33(3), L. 1941, c. 331, Section 3, as amended by L. 1944, c. 588, Section 5. Real Property Law, Section 279(2), L. 1941, c. 331, Section 2, as amended by L. 1944, c. 588, Section 2.

28 Schenectady Capital Stone Co. v. Holbrook, 101 N.Y. 45, 4 N.E. 4 (1885).

29 Personal Property Law, Section 33(5), added by L. 1941, c. 328, Section 3, as amended by L. 1944, c. 588, Section 5. Real Property Law, Section 279(4), added by L. 1941, c. 328, Section 2, as amended by L. 1944, c. 588, Section 2.

30 Real Property Law, Section 283, added by L. 1944, c. 250.

presumption of consideration. On the contrary, they take the philosophically more modern and honest standpoint of arriving at an end without employing unnecessary fictional means.

Under the common law all contracts made by infants were voidable, not void,[31] at the election of the infant. That is, the infant could avoid the contract; or if he so wished, could enforce it. Even if the infant had misrepresented his age, he could avail himself of the plea of infancy[32] and would not be liable in tort for this misrepresentation.[33] This common law rule was well founded in public policy; it seemed unjust to enforce contracts against children, and, for this reason, the infant was given a shield with which he could protect himself. Although sound in theory, the infant's privilege of avoidance often led to an unfair result. Unscrupulous infants actually had their promisors at their mercy; on the other hand, the honest infant who wished to contract could find few who dared enter into a contract with him, because adult promisors realized that the infant could escape his liabilities at any time he wished. The legislature has taken cognizance of this situation and has enlarged the contractual capacity of infants in certain cases.

In New York, an infant of fifteen years or more may make a valid life insurance contract for the benefit of himself or his father, mother, spouse, brother, sister, children, or grandparents.[34] This statute refers to a specific instance where infancy may not be pleaded. In 1941 the legislature passed a statute removing an infant's privilege of avoidance in a broader field. The statute prevents avoidance of a contract on the ground of infancy where the contract was made by an infant over eighteen years in connection with his business and was a reasonable and provident con-

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31 Slocum v. Hooker, 13 Barb. 536 (N.Y. 1852).

32 International Text-Book Co. v. Connelly, 206 N.Y. 188, 99 N.E. 722 (1912).

33 Sternlieb v. Normandy Nat. Securities Corp., 263 N.Y. 245, 188 N.E. 726 (1934).

34 Insurance Law, Section 145, added by L. 1940, c. 95, as amended by L. 1947, c. 126.

tract when made.[35] When the infant's right to disaffirm is claimed, the burden of showing that the contract was made in the infant's business and was reasonable and provident when made is placed upon the one seeking to deny or defeat the disaffirmance.[36]

Although the eighteen-year-old infant has to some extent lost the protection of his common law shield, the statute should benefit an enterprising infant who wishes to enter into a business by dispelling all fear that the infant will avoid his liabilities under a fair contract; as to such a contract he will now be bound as would any adult.

Although the infant's contract was voidable, the contract of a married woman at common law was absolutely void.[37] The theory was that upon marriage the husband and wife became a unity whose contractual capacity resided in the husband. This disability of the wife has gradually been removed by a series of statutes culminating in the present statute, which provides that, except for a disability to contract with her husband to alter or dissolve the marriage or relieve the husband from his duty of support, a married woman may make, and be liable on, any contract to the same extent as if she were unmarried.[38]

Thus, in New York, the shield of infancy has been dented and that of coverture removed for all practical purposes in the interest of the general public policy of enlarging rights and preventing a protection from being used indirectly as an unjust weapon.

At common law, a landlord and tenant could contract that the tenant should make all repairs and that the landlord was to be exempt from any liability whether caused by the landlord's negligence or not. The Court of Appeals expressly held that such a

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35 Debtor and Creditor Law, Section 260(1), added by L. 1941, c. 327.

36 Debtor and Creditor Law, Section 260(1), added by L. 1941, c. 327. De Jager v. Chilson, 185 Misc. 156, 57 N.Y. Supp. 2d 500 (1945).

37 Jackson v. Vanderheyden, 17 Johns. 167 (N.Y. 1819).

38 Domestic Relations Law, Section 51, as amended L. 1941, c. 13, Section 1. (Surety for husband) Bauer v. Ambs, 144 App. Div. 274, 128 N.Y. Supp. 1024 (1911).

contract did not contravene public policy.[39] The legislature has changed this public policy and substituted a new one.[40] Today, every covenant in, or collateral to, a lease of real property, exexempting a lessor from liability for injury to persons or property resulting from negligence of the lessor or his agent in the operation or maintenance of the demised premises, is void as against public policy and unenforceable.[41] This same policy against contractual avoidance of a duty to use reasonable care has led to a recent statute making void any agreement which purports to exempt owners of garages and parking lots, with capacity for four or more vehicles, from liability for their own negligence in housing, storing, parking, repairing or servicing said motor vehicles.[42] The obvious purpose of these statutes is to prevent the not uncommon circumvention of a common law liability.[43]

In keeping with the general policy behind the Workmen's Compensation Law, no agreement by an employee to pay a portion of the workmen's compensation premium shall be valid.[44] Nor, may an employee waive his right to compensation[45].

Commonly misunderstood are the "blue laws" and their effect on contracts. There was no common law prohibition against the making of contracts on Sunday,[46] nor, is there any statutory restriction in New York.[47] Furthermore, a contract made in a

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39 Kirshenbaum v. General Outdoor Adv. Co., 258 N.Y. 489, 180 N.E. 245 (1932).

40 Hanfeld v. Broido, Inc., 168 Misc. 85, 3 N.Y. Supp. 2d 463 (1938). See also, as to immunity clauses in leases, New York Law Journal, editorial, October 20, 21, 1942.

41 Real Property Law, Section 234, L. 1937, c. 907.

42 General Business Law, Section 89(b), L. 1949, c. 322.

43 Bernard Katz, Inc., v. East 30th Street Corp., 172 Misc. 873, 16 N.Y. Supp. 2d 640 (1939), aff'd 259 App. Div. 707, 19 N.Y. Supp. 2d 145 (1940).

44 Workmen's Compensation Law, Section 31, L. 1922, c. 615.

45 Workmen's Compensation Law, Section 32, L. 1922, c. 615.

46 Merritt v. Earle, 29 N.Y. 115 (1864). Boynton v. Page, 13 Wend. 425 (N.Y. 1835).

47 Penal Law, Article 192. See, McCormick v. Hazard, 77 Misc. 190, 136 N.Y. Supp. 91 (1912).

state which prohibits the making of contracts on Sunday will not be illegal in such a sense that it cannot be subsequently ratified so far as New York is concerned.[48] While not directly forbidding such contracts, New York does prohibit all labor on Sunday excepting works of necessity and charity;[49] construction of this statute renders void a contract calling for the rendering of services on Sunday;[50] but does not preclude recovery for work done on Sunday unless the contract expressly called for performance on that day.[51] "The true rule is, that a contract to be void by this law, must be expressly and altogether for an act which the law forbids; it must be a contract for labor, to be performed on the Sunday, exclusively and expressly, and not on any other day."[52] Again, it should be noted that this statute does not directly prohibit contracts made on Sunday, nor does the common law. Therefore, the only contracts which should be considered void will be those which call for an act on Sunday which is prohibited on that day. Consequently, contracts calling for baseball, basketball, hockey and football games after two o'clock in the afternoon which are permitted by a city, village or town ordinance, should be perfectly valid,[53] as also should be motion pictures, dramatic and musical productions under the same conditions.[54]

Numerous variations imposed upon the law of contracts by New York statutes have not been considered, the primary purpose of the foregoing article being to point up a few of the more important New York changes and modifications of the more basic concepts of contract law.

G. R. B.

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48 Hamilton v. Gridley, 54 Barb. 542 (N.Y. 1868).

49 Penal Law, Section 2143, L. 1883, c. 358, Section 1.

50 Albera v. Sciaretti, 72 Misc. 496, 131 N.Y. Supp. 889 (1911).

51 Watts v. Van Ness, 1 Hill 76 (N.Y. 1841).

52 Merritt v. Earle, 29 N.Y. 115, 116 b. (1864).

53 Penal Law, Section 2145, L. 1949, c. 655. eff. April 16, 1949.

54 Penal Law, Section 2154, added L. 1919, c. 257, as amended L. 1935, c. 410.

EFFECT OF THE REAL PARTY IN INTEREST STATUTE ON INSURANCE LOAN RECEIPTS

Plaintiff corporation leased certain premises from defendant, and while a tenant in said premises, plaintiff's property was damaged by water through defendant's negligence and failure to make repairs. Plaintiff made claim upon its insurer for the asserted damage and was paid the sum claimed upon executing a loan receipt to said insurer. Thereafter plaintiff sued defendant in the City Court of the City of New York, and defendant alleged, for a second affirmative defense, that plaintiff was not the real party in interest since it had been paid the amount of its claim by its insurer. Plaintiff's motion for an order striking this defense as sham was denied and upon appeal this determination was affirmed without opinion. *Miller Coat Co., Inc. v. Herbert, Inc.*[1]

The problem of the efficacy to be given to the loan receipt has confused the insurance lawyers and apparently bothered the courts for several years. The loan receipt is a written statement given by the owner of property to his insurer that any money received pursuant to the insured's claim resulting from damage to his property is received, not as a final payment, but as an advance pending the outcome of a claim against the party responsible for the damage.[2] The primary purpose in advancing the amount of the insured's loss as a loan rather than a final satisfaction of his claim is to avoid ostensible subrogation. Insurance

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1 300 N.Y. 477 (October 20, 1949) affirming 275 App. Div. 821. The receipt, typical in form read in part: "Received from the Home Insurance Company one thousand nine hundred forty and 40/100 dollars, as a loan and repayable only to the extent of any net recovery we may make from any person . . . . on account of loss by water damage to our property. As security for such payment we hereby pledge to said company the said recovery . . . . and we agree to prosecute suit . . . . at the expense and under the exclusive direction and control of said Home Insurance Company."

2 1 A.L.R. 1528.

companies do not prefer to prosecute actions in their own names because of the prejudicial effect that disclosure of their identity has upon the jury.[3] The Civil Practice Act requires that every action must be prosecuted in the name of the real party in interest,[4] and it has long been held that an insurance company which has paid the entire loss is the only real party in interest.[5] Hence, to avoid the undesirable and possibly prejudicial result of these rules, the loan receipt was devised to circumvent the real party in interest statute and hide the insurer's identity.[6]

The question that comes before the courts in the loan receipt situations is whether the money advanced is in fact a loan, or a final payment.[7] If it is a final payment, a suit in the name of the insured would be violative of CPA § 210. Procedurally, the question often arises as in the principal cases; i.e., the defendant sets up his affirmativve defense and the plaintiff counters with a motion to strike it as sham. The problem may also be raised in the form of the defendant's right to have the issue of the real party in interest litigated at a separate trial in advance of the trial on the merits.[8]

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3 Butera v. Donner, 177 Misc. 966, 32 N.Y. Supp. 2d 736 (1944).

4 At the time of the Miller decision, CPA § 210 read as follows: "Action to be brought in name of real party in interest. Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted." See *infra,* note 27 for the recent amendment.

5 Lord and Taylor v. Yale and Towne Mfg. Co., 230 N.Y. 132, 129 N.E. 346 (1920). That the insurer who has paid part of the insured's claim must be joined as a party plaintiff upon motion of the defendant, see Sisson v. Hassett, 155 Misc. 667, 280 N.Y. Supp. 522 (1929).

6 Historically, the loan receipt was developed for a different purpose. As originated by marine and inland marine insurance companies, it was intended to prevent a carrier from obtaining the benefit of the shipper's insurance. See Luckenbach v. McCahan Sugar Refining Co., 248 U.S. 139 (1918); New York cases in accord: Kalle & Co., v. Morton, 156 App. Div. 522, 141 N.Y. Supp. 941 (1913); Lee v. Barrett, 82 Misc. 475, 144 N.Y. Supp. 941 (1913); 1 A.L.R. 1528.

7 In Yezek v. Delaware, L. & W. R.R., 176 Misc. 553, 28 N.Y. Supp. 2d 35 (1941), the court established tests to determine whether the money paid by the insurer to the insured was in fact a loan.

8 15th Annual Report of The Judicial Council (1949) p. 59.

The validity of the loan receipt had been presented to the Court of Appeals twice before the *Miller* case of last October. In *Cocoa Trading Corporation v. Bayway Terminal,*[9] decided in 1943, the motion to strike out the defense as sham was denied. However, the Court refused to pass upon the validity of the loan receipt as such because it felt the evidence insufficient to determine whether the insured was a trustee of an express trust, or for any other reason was the real party in interest. Next, in *Sosnow, Kranz and Simcoe, Inc. v. Storatti Corp.,*[10] decided in 1946, the Court came up against the problem again and this time considered it. In that case an inland marine policy covered the owner when his merchandise was in the possession of a bailee or carrier, and provided that after loss the insurance company could either pay said loss or make a loan equivalent thereto. By directing a verdict for the plaintiff, the appellate division determined that the *insured* was the real party in interest, and this determination was affirmed without opinion by the Court of Appeals. Finally, in the principal case, *Miller Coat Co., Inc., v. Herbert, Inc.,* we see the highest court apparently reacting differently in considering a substantially similar situation. In the *Miller* case, the Court affirmed, again without opinion, a determination that the defense that the insured was not the real party in interest could not be stricken. It would appear on the surface, that the *Sosnow* and *Miller* affirmances are contradictory, yet an attempt was made to distinguish them when the *Miller* case reached the appellate division.[11] It was said there that in the *Miller* case there was no provision in the policy authorizing a loan as there had been in the *Sosnow* case. Until the *Miller* decision, it had been thought that the *Sosnow* ruling had validated the loan receipt as a bona fide method of circumventing the real party in interest statute, and it might seem that the *Miller* decision has made the question conjectural again. However, despite the apparent contradiction of the cases, it is possible that they may be recon-

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9 290 N.Y. 697, 49 N.E. 2d 632 (1943).

10 295 N.Y. 675, 65 N.E. 2d 326 (1946), aff'g. 260 App. Div. 122 (1st Dept.).

11 Miller Coat Co., Inc. v. Herbert, Inc., 275 App. Div. 821.

ciled on grounds other than those stated by the appellate division in the *Miller* case. The *Bayway Terminal* and *Miller* cases both held that the defense could not be stricken; whereas the court in the *Sosnow* case merely held, in effect, that they would direct a verdict for the plaintiff and would not permit a separate trial of the defendant's defense where there was no evidence presented on behalf of that defense beyond the mere loan receipt itself. In other words, without more, the court will take the loan receipt at its face value. This view has seemingly been embodied in the recent amendment to Section 210, discussed *infra.*

Since the Court of Appeals has not effectively determined the status of the loan receipt, the several departments of the appellate division have reached varying results. Those upholding the loan receipt are the Second[12] and Fourth[13] Departments, while the Third Department has chosen to construe Section 210 strictly.[14] The First Department, until last October, appears to have upheld the loan receipt by virtue of the *Sosnow* and similar cases.[15] The Court of Claims has decided clearly that the device is valid, and relies for such determination upon the authority of the *Sosnow* case.[16]

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12 Balish v. Advance Fuel Oil, 266 App. Div. 683, 40 N.Y. Supp. 2d 410 (1943); Zamochnick v. N.Y. Central R.R., 191 Misc. 318, 80 N.Y. Supp. 2d 65 (1948).

13 Anderson v. Socony-Vacuum Oil Co., 266 App. Div. 817, 42 N.Y. Supp. 2d 574 (1943); Butera v. Donner, 177 Misc. 966, 32 N.Y. Supp. 2d 736 (1944).

14 Slater Trucking Co., Inc. v. Maus, 273 App. Div. 139, 77 N.Y. Supp. 2d 343 (1948); Purdy v. McGarity, 262 App. Div. 623, 30 N.Y. Supp. 2d 966 (1941); Yezek v. Delaware, L. & W. R.R., 176 Misc. 553, 28 N.Y. Supp. 2d 35 (1941); Scarborough v. Bartholomew, 22 N.Y. Supp. 2d 635 (1940) aff'd 263 App. Div. 765, 30 N.Y. Supp. 2d 971.

15 Sosnow, Kranz & Simcoe, Inc. v. Storatti Corp., 295 N.Y. 675, 65 N.E. 2d 326 (1946); Home Insurance Co. v. Rosenfeld, 56 N.Y. Supp. 2d 454 (1945); Kalle & Co. v. Morton, 156 App. Div. 522, 141 N.Y. Supp. 941 (1913); Lee v. Barrett, 82 Misc. 474, 144 N.Y. Supp. 941 (1913).

16 Crane v. State of New York, 190 Misc. 1063, 75 N.Y. Supp. 2d 581. For a compilation of the conflicting cases in the lower courts, see 1945 Ins. L. J. pp. 199, 528, 592; 1948 Ins. L.J. p. 820.

Federal Decisions

The United States Supreme Court has recognized the validity of the loan receipt as to common carriers in *Luckenbach v. McCahan Sugar Refining Co.*[17] The agreement in that case was not employed to avoid the real party in interest statute, but to preserve an action against the negligent carrier, and the issue was whether there had been payment. The defendant carrier relied on a bill of lading provision affording it the benefit of insurance carried by the shipper, and maintained that the loan receipt could not disguise the fact of payment which would inure to its benefit and bar subrogation. The case has been cited as authority for many federal court decisions upholding the loan receipt.[18]

By virtue of a recent Supreme Court decision construing the federal real party in interest rule, the *Luckenbach* decision might conceivably be questioned as an absolute authority for upholding the loan receipt.[19] In *United States v. Aetna Casualty and Surety Co.*,[20] the court determined that subrogation claims against the United States were within the Federal Tort Claims Act,[21] and this finding depended partly upon an interpretation of the federal real party in interest rule. The court said (at page 160):

> "If the subrogee has paid an entire loss suffered by the insured, it is the only real party in interest and must sue in its own name. If it has paid only part of the loss, both the insured and the insurer have substantial rights against the tortfeasor which qualify them as real parties in interest."

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17 248 U.S. 139 (1918).

18 Dixey v. Federal Compass and Warehouse Co., 132 F. 2d 275 (C.C.A. Ark. 8th 1942); The Plow City, 122 F. 2d 816 (C.C.A. Pa. 3rd 1941); Price and Pierce v. Jarka Great Lakes Corp., 37 F. Supp. 939 (Dist. Ct.W. Mich 1941); Auto Ins. Co. v. Springfield Dying Co. 109 F. 2d 533 (C.C.A. Pa. 3rd 1940).

19 Federal Rules of Civil Procedure § 17a.

20 94 L.Ed. 151 (Dec. 12, 1949).

21 28 U.S.C. 1346 b, 2674.

Some might view this language as weakening the authority of the *Luckenbach* decision, but since the *Aetna* case did not consider the loan receipt, the argument is probably without merit.

Alternative Devices—The Trust Agreement and Subrogation Receipt

The theory of the trust agreement is to avoid compulsory subrogation by declaring an express trust which would come within the exception permitting a trustee to sue in his own name without joining his beneficiary.[22] In the usual case the insured agrees to bring suit in his own name against the party responsible for the loss through counsel selected by the insurer. The agreement provides that both legal and equitable title to the cause of action remains in the insured who is constituted a trustee of the recovery, promising to repay it to the insurance company. The device was expressly recognized in *Banca C.I. Trust Co. v Clarkson*,[23] the court holding that where the plaintiff bank sued on behalf of its surety company which had made good the loss, it was error for the trial judge to send to the jury the question whether plaintiff was the real party in interest and to refuse to strike out the defense which raised that issue. As trustee of an express trust, plaintiff was entitled to sue in its own name.

A New York County Supreme Court decision of last September has strengthened the conclusions reached in the *Clarkson* case. In *Brunner-Ritter, Inc. v. Town Park Garage, Inc.*,[24] it was held that the owner of an automobile was the real party in interest and entitled to prosecute an action against a garage for the dis-

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22 See note 4 *supra.*

23 274 N.Y. 69; 8 N.E. 2d 281.

24 91 N.Y. Supp. 2d 873 (Sept. 22, 1949). The trust agreement, typical in form, read in part: "It is distinctly understood that the legal and equitable title to our causes of action against the party or parties responsible for the loss sustained by us shall remain with us and shall not pass to the aforesaid insurance company by reason of their prospective payment to us. Further, we hereby agree to become trustees of this express trust, and hereby pledge that the proceeds that may be recovered by us under this prospective action will be held in trust for us for the benefit of the aforesaid insurance company."

appearance of his automobile notwithstanding he had received money from his insurer and had executed a trust agreement promising that the proceeds of the action would be held in trust for the benefit of the company. The question arose in the same manner as in the loan receipt situations, i.e., the defendant garage interposed the defense that the insured was not the real party in interest, and after a trial of this separate issue prior to the main trial, the defense was stricken. The court noted that the insurance policy contained no clause authorizing the giving of the loan receipt, but held that the nature of the transaction was dependent upon the terms and provisions of the trust agreement which evidenced the agreement between the parties. By retaining title to the causes of action, the plaintiff was constituted the trustee of an express trust and as such was the real party in interest as required by CPA § 210. Hence we see the trust agreement devised to circumvent the statute by coming directly within the exception.

The subrogation receipt is a document signed by the insured, and includes a release to the insurance company, an assignment of the insured's claim, and a recital that the insurer is subrogated to the extent of the payment made to the insured. Since the insurance company is automatically subrogated upon payment, this device does not seem to place the company in any more favorable a position. However it is generally used where the insured does not wish to become a trustee or admit that the settlement was received as a loan.[25]

Conclusion

Since the loan receipt has enjoyed such popularity among the insurance companies,[26] and will in all probability continue to be extensively employed, it is desirable that its exact status be de-

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25 See 31 U.S.C. 203; U.S. v. Aetna Casualty & Surety Co., 94 L. Ed. 151 (1949).

26 Mr. Justice Brandeis, in Luckenbach v. McCahan Sugar Co., 248 U.S. 139, said, at 148, 149: "Agreements of this nature have been a common practice in business for many years . . . . it is creditable to the ingenuity of businessmen that an arrangement should have been devised which is consonant both with the needs of commerce and the demands of justice."

termined. The Judicial Council has often recommended that Section 210 be amended to permit the insured to sue in his own name without the additional and hazardous litigation of the real party in interest issue.[27] To permit a plaintiff on the trial of the main issues of a negligence action to refer to the fact that the defendant is insured is to commit error.[28] It would therefore seem somewhat unfair to permit a defendant to refer to the fact of the plaintiff's insurance by raising the question of who is the real party in interest. Both parties should have equal protection. A somewhat weaker argument of the public interest to be protected has also been advanced. When the insurance companies have been deprived of recoveries because of the defendant's advantage, it is not improbable that the companies would be disposed to seek an increase in premium rates.[29] It would appear that the trust agreement attacks the problem directly without creating the loan-payment issue involved in the loan receipt. It has not created any diversity among the courts as to its validity and should consequently be more in general use by the insurance companies.[30] The final validity of the loan receipt, on the other hand, has not been affirmatively determined by the Court of Appeals; and it was probably with this partly in mind that the real party in interest statute was amended at the recent session of the legislature.[31] Although the section now extends the exceptions to include an insured person who has executed a loan receipt, it would not seem to resolve the problem of the defendant's right to show, through sufficient evidence, that the loan receipt is in fact a disguise for final payment.

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27 15th Annual Report of The Judicial Council (1949) p. 58. As amended by L. 1950, c. 529, there was added to the list of exceptions in Section 210 "an insured person, corporation, joint stock association or other unincorporated association which has executed to his insurer either a loan or subrogation receipt, trust agreement, or other similar instrument . . . ."

28 Rodzborski v. American Sugar Refining Co., 210 N.Y. 262, 104 N.E. 616 (1914); Aiken v. Lee, 206 N.Y. 20, 99 N.E. 85 (1912); Simpson v. Foundation Co., 201 N.Y. 479, 95 N.E. 10 (1911).

29 15th Annual Report of The Judicial Council (1949) p. 60.

30 Branca C.I.T. Trust Co. v. Clarkson, 274 N.Y. 69, 8 N.E. 2d 281; Bruner-Ritter, Inc., v. Town Park Garage, Inc., 91 N.Y. Supp. 2d 873 (1949).

31 L. 1950, c. 529.

LEGAL CLOUDS FOR RAINMAKERS

The advantage of knowing, even twenty-four hours in advance, what the weather is likely to be is tremendous. Great savings in property and of lives at sea and on land, and in the air result from adequate warnings of severe storms and fogs. But weather control or modification of the more extreme rampages of the elements had long been a mere dream of many experimenters.

In July 1946, Vincent L. Schaefer, a General Electric Company chemist, produced snow by passing dry-ice through a supercooled cloud. A supercooled cloud is a moisture cloud containing droplets in a liquid water state. Because of the state of unstability of these clouds, the introduction of dry-ice created nuclei of ice particles causing a contraction within the cloud formation and a resultant precipitation. The experimenters believe that in some cases this merely serves to start the precipitation cycle earlier than would occur naturally, whereas under other conditions precipitation might be induced in clouds that would continue as clouds for longer periods before the precipitation cycle started.[1] Further experiments lead to the discovery that rain could be produced by "seeding" the clouds with dry-ice particles from the air or by bombarding the clouds moving over a particular area with silver iodide particles from the ground. The possible applications of the principles of this discovery to influence the weather to man's advantage are: (1) storm and hurricane modification; (2) water storage and drought alleviation; (3) prevention of freezing rain, sleet and glaze; (4) cloud and fog dispersal around airports; (5) forest fire prevention; (6) flood control; and (7) military uses.[2]

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1 Simpson Bill Hearings, March 18, 1948, Dr. D. E. Chambers, General Electric Company representative.

2 See Ball, "Shaping the Law of Weather Control," 58 Yale Law Journal 213 (1949).

Weather modification may require fundamental changes in vital concepts of law and government which the people and communities are hesitant to make because of their effects on other aspects of their living. The legal question arises as to the liability of experimenters for invading the clouds over another person's land or causing rain or snow to fall on another's land. Some initial legal questions are: (1) who owns the clouds; (2) what are the rights of persons whose property has been damaged by artificially created rainfall; (3) is rainmaking the creation of a private nuisance; (4) what are the interstate and international interests involved in weather control? Analogies may be found in the field of existing tort and property laws.

Property Analogies

One of the basic elements of property law is possession, control, or user. It is quite evident that clouds, in their movement across the sky like air and light, are not the subject of exclusive possession to the individual landowner below; inasmuch as no power of control of clouds is in the landowner, they therefore cannot be regarded as property in the conventional view. Property law recognizes that the landowner does possess and has the right to exclusive possession to that amount of space above the land which is reasonably necessary for the enjoyment of the land itself. Clouds ranging at a height usually above the reasonably necessary area are not the subject of use to one landowner any more than to adjoining property owners.

Since clouds are primarily useful for moisture or water, the subject of water rights is probably as close an analogy in the property law as can be found for determining relative "rights," "servitudes," "easements" or "interests" in the precipitation process. Water rights have been developed in three subjective categories relating to watercourses, subterranean waters, and surface waters. In solving legal questions regarding weather control, the courts may draw on the doctrines found in these subjects for guidance in analyzing the problems presented in civil suits by landowners.

Watercourse law has two principal doctrines for consideration, the "natural flow doctrine" and the "prior appropriation doctrine." The "natural flow doctrine" allows each riparian proprietor the right to have the water of a stream flow by his premises in its natural course and volume recognizing the right of upper riparian owners to make reasonable use of such waters, the rights of all riparian owners being mutual, common or correlative,[3] in the nature of a tenancy in common. The riparian owner's right is usufructuary in character and not the subject of absolute ownership until the water is segregated from the stream. There remains a residuum of common or public ownership resting in the state to the natural flow of the stream. Non-navigable waters may be privately owned; but navigable waters are not susceptible of private ownership.[4] In order to constitute a watercourse, it is necessary that there be a permanent source of supply[5] and the source must have a well-defined existence.[6]

The "prior appropriation doctrine" applies to situations where a dam or weir is constructed in the stream and allows the proprietor who first constructs his dam for a useful purpose to have the right to maintain it as against the owners above and below.[7] The limitation placed on this right is that in so detaining the water he must use reasonable care and skill not injure another's property. He must also take precautions to prevent foreseeable flooding which might injure others.[8]

Inasmuch as moisture-bearing clouds form and disintegrate in the course of their travel and have no well defined source of existence or continuous stream of flow, they seem to present legal considerations so substantially different from those developed

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3 56 American Jurisprudence 502.

4 Oklahoma v. Texas, 258 U.S. 574 (1921).

5 U.S. v. Ide, 277 F. 373 (1921).

6 Re Johnson Creek, 159 Wash. 629, 294, P. 566 (1930).

7 30 LRA 669; 59 LRA 826.

8 Hartschorn v. Chaddock, 135 N.Y. 116, 31 N.E. 997 (1892).

around the concept of riparian rights that analogies drawn from that phase of watercourse law appear of doubtful value.

The next division of water law wherein analogies might be found are in the rules relating to percolating and subterranean waters. The principal theories in this branch of water law are the common law and the "reasonable use or correlative rights" doctrines. The common law theory is that the owner of the overlying land had absolute ownership of the percolating water below. The common law theory is still followed in some of the eastern states. The "reasonable use" theory is founded on the practical basis that there is no absolute ownership of percolating waters—the rights of landowners is dependent on their action in reducing the subterranean water to control and their rights are correlative until such action is taken. Each landowner is restricted to a reasonable exercise of his own rights and a reasonable use of his property in regard to similar rights to percolating waters by other adjoining landowners.

Probably as close an analogy in the field of property law to rights in cloud moisture or rainfall are those rights developed in the division called surface waters. The riparian rights of watercourse law do not attach to surface waters, the lower proprietor has no right to have surface water flow to his land from the upper or higher land and a landowner has the right to collect and appropriate to his own use all surface water upon his property without liability to other owners upon whose property it would flow if not so appropriated.[9]

Under the surface water rules, there are three theories respecting rights and interests in the waters: (1) Civil Law Rule (2) Common Enemy Rule (3) Reasonable Use Rule.

The Civil Law Rule is that as between the owners of the higher and lower ground, the upper proprietor has an easement to have surface water flow naturally from his land onto the land of the lower proprietor which is subject to a corresponding servi-

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9 Barkley v. Wilcox, 86 N.Y. 140 (1881).

tude, and hence the lower proprietor has not the right to obstruct the flow and cast the water back upon the land above.

The Common Law or Common Enemy Rule conceives surface water as a common enemy which every proprietor may fight as he deems best regardless of its effect on other proprietors. The lower proprietor may make any improvements of his property for his protection against water drainage from outside his land, even though it may result in throwing the water back upon the land of an adjoining proprietor, provided it is not done in a reckless manner,[10] or in such way as to create a nuisance and destroy his property.[11] In some jurisdictions the common law rule has been modified to the extent that one must use his own land so as not unnecessarily or negligently to injure others.[12]

The "reasonable use rule" obtains in two jurisdictions[13] and holds that each possessor is privileged to make a reasonable use of his land even though the natural drainage of surface waters is changed and results in damage to others. The doctrine revolves around the negligence theory of reasonableness and takes into account the purpose and motive of the actor, foreseeability of damage, and the amount of damage caused. The reasonable use rule does not deal so much with specific rights or privileges as the other two rules but deals more in the facts of each case as a whole in the sense of legal obligations.

The integration of these basic concepts of property law may enable the judiciary to formulate a feasible solution to the problem involving the use of man-made rain. They may, perhaps, decide that reasonable use of rain-bearing clouds is most appropriate; taking into consideration the needs of the surrounding communities, and the other exigencies presented. On the other hand, the governmental authorities may be given complete control of weather modification before private individuals are allowed to appropriate the "water particles" in private experiments.

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10 Goll v. Chicago A. Ry. Co. (Mo.), 197 S.W. 244 (1917).

11 Deason v. Southern Ry. Co., 140 S.E. 575 (1927).

12 Barkley v. Wilcox, supra, note 9.

13 Swett v. Cutts, 50 N.H. 439 (1870); O'Brien v. St. Paul, 25 Minn. 331 (1878).

Tort Law Analogies

In the field of tort law there are several theories by which the courts may find liability for alleged damages to real or personal property caused by artificially created rain.

As mentioned earlier under the property analogies, it is very doubtful that the courts would find the landowner having property rights in the cloud moisture 15,000 feet above his land. "The 'ad coelum' doctrine—that he who owns the soil owns upward to the heaven has never been applied literally in airspace above that which is necessary to the reasonable use and enjoyment of the lands and buildings below. The English decisions citing the maxim in practically every case employed it to illustrate rights of the plaintiff under the laws of nuisance rather than his rights under the law of trespass. The rule was adopted when use of the upper air was not thought possible, and when such aerial trespasses as did occur were relatively near to the surface of the land and were such as to exercise some direct harmful influence upon the owner's use and enjoyment. The upper air is a natural heritage common to all of the people, and its reasonable use ought not to be hampered by any artificial mixim of law such as is here involved."[14]

In considering the vertical extent of possession of airspace by the landowner in relation to aeronautics and the development of air travel. about four theories have been advanced:

(1) The Zone theory which considers as a factual proposition the effective possession and the height of the zone essential to the use and enjoyment of the land.

(2) Uniform Aeronautics Law which recognizes unlimited ownership of upward space by the landowner subject to the right of flight similar in nature to the public right to use a navigable stream.

(3) Limitation of owners right to actual use and denies a trespass unless interference is with present enjoyment of land.

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14 6 Air Law Rev. 113.

(4) The nuisance theory says there is no possessory interest in airspace, denies all trespass, and the nuisance remedy is for actual interference with the use resulting from aerial flights.[15]

These views are primarily concerned with the conflict between the landowner and the airplane. It may not be accurate to say that these theories are applicable to the immediate problem since it concerns the question of the appropriation of a particular substance (clouds) of the atmosphere and not the appropriation of the airspace to another substance (airplane). But, the rights and duties imposed by one or more of the four theories may be transplanted into this new legal field as it concerns the uses of, or the uses in, the airspace.

The "extra hazardous activity"[16] doctrine is another phase of absolute liability for harm caused by casting objects or debris on the land of another. Weather modification might be regarded in the same category as the blasting cases if substantial damage to the land resulted.[17] But it is doubtful in the absence of a deluge that present capabilities for producing rain artificially could be regarded as causing substantial injury to the ground or crops.

Probably the most appropriate division of tort law in which to determine the liability of the rainmaker for damage to real property resulting from experimentation is the field of nuisance. For a nuisance to be actionable, there must be an unlawful use by a person of his own property in such a way as to cause material annoyance, discomfort or hurt to other persons or the public generally and violating the rights of another in an essential degree.[18] As a general rule, the question of nuisance is one of degree[19] and usually turns on a question of fact. The question as to what con-

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15 Prosser on Torts, p. 87.

16 Restatement of Torts, Sec. 519-520.

17 See Smith, "Liability for Substantial Physical Damage to Land by Blasting," 33 Harvard Law Rev. 542 (1920).

18 McNulty v. Ludwig, 153 App. Div. 206, 138 N.Y. Supp. 84 (1912); Nicoll v. Ossining, 128 Misc. 848, 220 N.Y. Supp. 345 (1927).

19 McCarty v. Natural Carbonic Gas Co., 189 N.Y. 40, 81 N.E. 549 (1907).

stitutes a nuisance depends upon the nature and result of the acts of which complaint is made, and not upon the means produced or the particular description applied to them. The injury or annoyance which will warrant relief against an alleged nuisance must be of a real and substantial character.[20]

The probable uses for which the rain will be effected will in most instances be a benefit and not a detriment to the various property owners. Perhaps continuous experimentation may tend to produce situations similar to the smoke from factories and thus cause substantial annoyance, and interference with the enjoyment of one's property. This would bring about liability for damages and the injunctive processes of the courts.

Natural and Proximate Cause

One of the greatest difficulties for a plaintiff seeking to prosecute a claim against the experimenters in weather for either nuisance or negligence will be proving that "seeding" the clouds were in fact the cause of his damages. At the present time scientific data shows a very small percentage increase in rainfall due to artificial triggering of clouds. The chain of causation between the cloud seeding and the possible damage resulting from rainwater, unless a veritable deluge was coincident with the experiment, involves so many additional natural factors such as terrain relief, surface drainage, and other elements of the precipitation cycle—temperature, winds and airpressure, and humidity—that proof of causation at best would be speculative and the question of whether the claimed damage should be reasonably anticipated would favor the experimenters.

The possible defenses which could be advanced as favorable to the experimenters would be broad questions of public policy encouraging the experiments for their possible social and industrial value to the public generally. In the present water shortage which faces the City of New York, with reservoirs considerably depleted, the theory of public necessity would be a substan-

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20 Campbell v. Seaman, 63 N.Y. 568 (1876); Yonkers v. Federal Sugar Refining Co., 136 App. Div. 701, 121 N.Y. Supp. 494 (1910).

tial defense to any incidental damage that might result from weather experimentation by a municipality under these circumstances.

Property or Tort

The fundamental question is whether the loss or inconvenience resulting to one or a group of persons from experiments with weather modification should be left where it falls, shifted to the persons causing it, or whether legislation should be passed which would exempt the experimenters and the governmental instrumentality from liability for incidental damage in the interest of the general welfare, assuming, of course, that such experiments will eventually prove beneficial.

To seek the legal solution to the question in the field of property law by use of the analogies mentioned above would find the courts dealing in property concepts—of "rights," "privileges," "servitudes and natural easements." To deal in rights and servitudes would require qualifications and restrictions more difficult of expression in the weather field than they have been in the field of water rights. The terms assume the pre-existence of an intangible thing called a right which has a stringency acquired from long use in land law and do not lend themselves to the flexible legal relationships necessary for formulating a body of rules in the meteorological field.

Tort law with its conditions precedent to liability, and the legal obligations concept gives a much more direct approach to the necessity of actual damage, the reasonableness of the experimenters conduct, and the comparative value of the interests involved over the property concepts of rights, servitudes, and easements. It is apparent that the science of weather modification would best be developed to the advantage of agriculture, industry and community life by placing the least number of legal obstacles in its path. The tort field of negligence or nuisance would require that degree of responsibility and legal obligation on the part of the experimenters which would protect the general public and at the same time give them the necessary latitude to develop their

meteorlogical experiments. This is the course the law followed in permitting the development of aeronautical science which is also vital to the new art of weather modification.

Legal Authority Through Legislation

With the foregoing framework of law confronting the experimenters, there has been considerable hesitation on their part to risk the incalculable litigation and liability which might be visited upon them as a result of experiments conducted over settled land areas. They have accordingly withdrawn from any private or contractual experiments outside of the laboratory unless the government includes in their contracts "save harmless clauses" to exempt them from liability.[21] Some writers believe that problems presented by weather control can be handled by the process of common law, case by case, and that legislation would be premature.[22] Others recommend broad legislation to limit the claims for damages to suits against the government itself, exempting the contractors. Further recommendations have been made to establish a Federal Precipitation Commission to work with the Department of Agriculture and Weather Bureau in coordinating and directing experiments in weather modification and limiting the experiments to sparsely settled areas.[23]

It is obvious that divergent legal results will ensue in the various state courts. The outcome will depend upon the law being applied in a given jurisdiction and any uniform solution seems impossible for all practical purposes.

For the concern of all interested parties, for a more beneficial program in experimentation, and for the most desirable method of control, it would appear ultimately that some plan should be formulated by legislation in the national lawmaking body. Interven-

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21 Simpson Bill Hearing, March 18, 1948, HR 4582; HR 4623, May 10, 1949, A bill to indemnify contractors in the field of cloud modification research against claims by third parties or damage to property of contractor.

22 Legal Intelligencer, April 30, 1948, based on Editorial from Harvard Law School Record.

23 Simpson Bill Hearing, March 18, 1948.

tion by the national government will bring about the concentration of more expansive resources and an enlarged field from which to draw experienced personnel. It would eliminate any controversies between states and also establish regulatory measures defining and limiting both the use of and liability for rainmaking expeditions.

On the national level such constitutional percepts as interstate and international relations; state versus federal power; the commerce clause including air commerce and navigable waters; national defense; due process in the property law;[24] and governmental immunity or waiver thereof for tort damages would be given primary consideration.

G. T. H.

24 See Bensinger, "From Man-Made Rain, A Flood of Legal Problems," 22 Temple Law Review 99.

Recent Decisions

BANKRUPTCY — CONTEMPT — STAY OF EXECUTION—The supreme court on February 11, 1948, rendered a verdict in favor of plaintiffs-respondents against defendant corporation in the sum of $7,000 with interest. On defendant's motion, a ten-day stay of execution was granted by the trial justice. Judgment was entered on February 14, 1948, and on February 24, 1948, the judgment debtor, acting through its president, Jacob Handelman, filed a voluntary petition in bankruptcy. Respondents made a motion at special term for an order adjudging appellant Republic Camera Corporation in contempt of court. This motion was granted and affirmed by the Appellate Division, First Department. *Held,* order holding both corporation and its president in contempt of court for filing a voluntary petition in bankruptcy during a stay of execution granted at corporation's request properly affirmed. *Wegman v. Republic Camera Corporation,* 300 N.Y. 650, 90 N.E. 2d 897 (1950).

This is the first time the New York Court of Appeals has spoken on this matter and the decision was rendered without opinion. The main question involved appears to be whether a state court may hold a person in contempt for filing a petition in bankruptcy under Section 59 of the Bankruptcy Act (11 U.S.C. § 95).

In re Kepecs, 123 N.Y. Supp. 872 (1910), a supreme court appellate term case, held that where a judgment debtor was ordered in supplementary proceedings not to dispose of his property, he could not be held in contempt of court for filing a petition in bankruptcy while order remained in effect. In *Franklin Factors Corporation v. Louis H. Green,* 170 Misc. 229, 9 N.Y. Supp. 2d 921 (1939), the same court held that a motion to punish a corporation's president for contempt for filing a petition for reorganization with the bankruptcy court during a stay of execu-

tion, granted on the corporation's motion, should have been denied; since the state court could not stay the filing of a bankruptcy petition.

The present case would appear to overrule the *Franklin Factors Corporation* case, *supra,* and possibly *In re Kepecs, supra,* as well. The difference in effect between an order in supplementary proceedings forbidding a disposal or transfer of property and a stay of execution granted on judgment debtor's motion, in regards to the filing of a petition in bankruptcy during either, seems to be negligible. Both are designed to keep the judgment debtor's property intact until execution is levied, and the filing of the petition places the property in the control of the bankruptcy court and out of the state court's control. The effect upon a state court of the filing of a petition in bankruptcy or a petition for reorganization is likewise the same, removal of the property from the state court's control.

Fillingen v. Thornton, 49 Ga. 384, 12 Nat. Bankr. Rep. 92 (1873) held that a state court may not grant an injunction restraining a person from applying for the benefits of the Bankruptcy Act.

A noted authority on bankruptcy has stated in his treatise on the subject, "The right to file bankruptcy proceedings and to enjoy its benefits is an inherent right which cannot be curtailed or circumvented by injunction or other process." *Nadler, The Law of Bankruptcy,* § 77 (cases cited.)

In re Francisco, 245 F. 216, 32 A.L.R. 980 note case (N.D. N.Y. 1917) held that a judgment debtor could be held in contempt of the state court if, during supplementary proceedings he used his own non-exempt funds to pay an attorney to institute bankruptcy proceedings. Only the use of funds prior to the filing of the petition was held a contempt however, and the actual filing was not so held.

Under New York law, disposal of property by a judgment debtor during a stay of execution granted at his request is a contempt of court, *Jedeikin v. Long,* 154 Misc. 835, 278 N.Y. Supp.

464 (1935). On the other hand a defendant may not be held in contempt for a transfer of his assets during pendency of a stay of execution which was not sought by him nor obtained by any false promise to preserve *status quo. Daily v. Groehnert,* 153 Misc. 427, 275 N.Y. Supp. 257 (1934).

A stay of execution when granted on defendant's motion implies a promise on his part that he will not dispose of his property during the stay. *Advance Piece Dye Works, Inc. v. Zeller,* 150 Misc. 908, 270 N.Y. Supp. 487 (1934).

It would appear from these New York cases that there is an element of estoppel involved in a stay of execution, and the court may have used this as a basis for the decision in the present case. The defendant, at his own request, was granted a stay of execution and impliedly promised not to dispose of his property. He may therefore be estopped from filing a petition. The situation is somewhat analagous to the removal procedure from state to federal court. A plaintiff with a cause of action which may be tried in federal court may not have it removed to federal court once he has begun his action in the state court. *U.S.C. Tit. 28 § 1441, Shotkin v. Board of Pensions of Presbyterian Church in U.S.,* 343 Pa. 650, 23 A. 2d 419, certiorari denied, 63 S. Ct. 58, 317 U.S. 632, 87 L. Ed. 510 (1942). In the case of removal however, the estoppel is established by federal statute and not by the state court.

The effect of this case is to nullify to some extent the power and authority of the bankruptcy court, and the question is still open as to whether the bankruptcy court might enjoin the contempt proceedings under Section 11 of the Bankruptcy Act. (11 U.S.C.. § 29).

B. R. R.

CONSTITUTIONAL LAW — DAMAGES FOR BREACH OF RESTRICTIVE COVENANTS IN DEEDS—It is now accepted law that the state, through its judicial process, may not grant specific performance of an agreement when the plaintiff is seeking specific enforcement of a racial restrictive provision. This

was definitely settled in *Shelley v. Kraemer,* 334 U.S. 1 (1948). In that case the respondents sought to have the petitioners divested of title to land which was subject to racial restrictive covenants. The petitioners were negroes. The Supreme Court held that specific performance of a racial restrictive agreement by judicial decree is a violation of the Fourteenth Amendment, although the agreement itself is constitutionally valid. As was held in *Corrigan v. Buckley,* 271 U.S. 323 (1926), a restrictive covenant is not itself a jurisdictional basis for review by the Supreme Court of the United States. The plaintiffs brought a bill to specifically enforce a restrictive covenant. The defendants were (1) a land owner who had covenanted with other land owners not to sell their property for a period of twenty-one years from the date of the covenant to a member of the negro race, and (2) the vendee who was a negro. The defendants moved to dismiss the bill on the grounds that the covenant made the bill unenforceable in that the same was contrary to the Constitution of the United States and void as contrary to public policy. Both motions to dismiss were overruled, with leave to answer. The defendants elected to stand on their motions and a final decree was entered enjoining them as prayed in the bill. The court of appeals of the district affirmed the decree. The Supreme Court dismissed the appeal on the ground that the Thirteenth Amendment denouncing slavery was confined to enforced compulsory service of one to another; the Fifth Amendment is a limitation on the powers of government; the Fourteenth Amendment has reference to state action only, and nowhere in the Constitution are private lot owners prohibited from entering into twenty-one year mutual covenants not to sell to any person of negro blood or race. As regards public policy, the Court said that the Constitution is not involved and therefore affords no basis for an appeal to this Court.

The question that naturally presents itself then, is: if the agreement is constitutionally valid will an action for damages lie for the breach of it?

Subject to restrictions imposed by courts of equity, it is a general rule of contracts that two remedies are available to the plain-

tiff who suffers a breach of contract: (1) specific performance, or (2) damages for the breach. As was *stated* in *Weiss v. Leaon,* 225 S.W. 2d 127 (1949) at page 131: "For the breach of a valid agreement there is ordinarily a remedy by way of damages. The fact that another remedy, specific performance, is ruled out because of constitutional reasons, need not necssarily affect the remedy by way of damages unless it, too, is unconstitutional under the circumstances." In that case the plaintiff brought an action against the present land owner to restrain him from selling to negroes his property which was subject to a racial restrictive covenant. In the alternative the plaintiff sought damages. The Supreme Court of Missouri held that judicial enforcement of such an agreement would violate the Fourteenth Amendment as was clearly shown in *Shelley v. Kraemer, supra,* but that an action for the breach of the covenant could be determined by the court without violating any provision of the Federal or State Constitution.

The validity of the racial-restrictive type of agreement is not destroyed by the Constitution. The section of the Constitution which most clearly comes in contact with this problem is that part of the Fourteenth Amendment which provides that "No state shall deny to any person within its jurisdiction the equal protection of the law." Obviously the state is not involved when two private citizens contract in respect to their individual property. They may sell to whom they please, and purchase from whomever they please. If parties respect a racial restrictive covenant among themselves, it is valid and binding to the degree that they observe it. However the state may not use its judicial process to force one party to observe the covenant because in so doing it is clearly discriminating on a basis of color between citizens.

In a recent New York case, *Dorsey et al., v. Stuyvesant Town Corporation et al.,* 299 N.Y. 512, 87 N.E. 2d 541 (1949), the New York Court of Appeals held that the barring of negroes from a large housing facility was not such a violation of either the Federal Constitution or the State Constitution as would support an action to restrain the defendant-owners from discrim-

inating against negroes. The appellants, negroes, maintained that because the city had lent its power of eminent domain and allowed the improved realty to be tax-free for a period of twenty-five years, that the housing was a governmental function. In response to this argument the Court said that tax exemptions and powers of eminent domain are freely given to many organizations which necessarily limit their benefits to a restricted group, and that it has never been held that the recipients are, therefore, subject to the restraints of the Fourteenth Amendment. "The Merchant Marine, air carriers, and farmers all receive substantial economic aid from our federal government and are subject to varying degrees of control in the public interest. Yet it has never been suggested that those and similar groups are subject to the restraints upon governmental action embodied in the Fifth Amendment similar to the restrictions of the Fourteenth Amendment upon the states." (p. 535).

It would appear that a racial-restrictive agreement between private citizens is neither illegal *per se,* nor so opposed to public policy gleaned from the Constitution, statutes and decisions of the country that the courts will refuse to entertain a suit for damages based upon it. While the sentiments of many may oppose it on the ground of being morally reprehensible, yet to vitiate the contract on grounds of illegality would seem to intrude dangerously far into the private right of the citizen to deal with whomever he pleases. Apparently, as long as the citizen may so contract, he may be entitled to damages if the racial restrictive provision be breached.

D. J. H.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE —SEGREGATION OF PASSENGERS — Appellant, a negress, sued the appellee for damages sustained after she was forcibly ejected from one of the appellee's buses while she was an interstate passenger on a journey from Illinois to Kentucky.

At the Kentucky state line she was requested to move from her seat in the front of the bus to a seat in the rear as required by the bus company's regulations. She refused and was ejected

by the driver, who was assisted by a local police officer from Wickliffe, Kentucky. The rules of the bus company requiring segregation of white and colored passengers had previously been filed with the Interstate Commerce Commission and the Kentucky Division of Motor Transportation.

Held: That the rule of the carrier requiring separate seating of colored and white passengers was a burden on interstate commerce and furnished no immunity from damages which might flow from its enforcement. *Whiteside v. Southern Bus Lines*, 177 F. 2d 949 (1949).

The court concedes that Kentucky has no statute compelling segregation on common carriers but states that segregation by custom and long settled usage has crystallized into the unwritten law of Kentucky, *Brumfield v. Consolidated Coach Corporation*, 240 Ky. 1, 40 S.W. 2d 356 (1931), and *Ohio Valley Ry's. Receiver v. Lander*, 104 Ky. 431, 47 S.W. 344 (1898). The court further reasoned that such a law of the state imposed an unreasonable burden on interstate commerce and therefore must be considered unconstitutional.

It is clear that state laws which unreasonably burden interstate commerce violate the commerce clause of the Federal Constitution and must fail. State regulations requiring segregation have been held to impose such an unreasonable burden on interstate commerce, *Morgan v. Virginia*, 328 U.S. 373 (1946).

Although, ordinarily individual action will not constitute a burden on interstate commerce unless contrary to some congressional statute, individual action may become state action when the state sanctions and enforces the actions of individuals, *Smith v. Allwright*, 321 U.S. 649 (1944); *Shelly v. Kraemer*, 334 U.S. 1 (1948). Appellee filed its regulations with the state and appellee also asked and obtained the assistance of a state police officer in enforcing its regulations. Either of these acts might constitute state action. Furthermore, the decisions of the United States District Court for the Western District of Kentucky and the United States Court of Appeals in this case seem to uphold

this contention. On page 953 of the opinion, the court probably was too broad in stating that individual action can violate the commerce clause of the Federal Constitution.

The court apparently did not attempt to rely on the equal protection of the laws clause of the Fourteenth Amendment because it would be squarely confronted with the "equal but separate," accommodations justification used for segregation in the famous case of *Plessy v. Ferguson,* 163 U.S. 537 (1896), and in other similar cases such as *Louisville, N.O.&T. Ry. Co. v. State of Mississippi,* 133 U.S. 587 (1890), and *Sipuel v. Board of Regents of the University of Oklahoma,* 332 U.S. 631 (1948), which cases have not been overruled by the United States Supreme Court.

C. E. L.

CRIMES — LARCENY — CONCEALING AND WITHHOLDING—DOUBLE CONVICTION—The defendant, a police officer in the city of Ithaca, was convicted of the crime of grand larceny, first degree and the crime of concealing and withholding stolen property. The facts show that the property stolen consisted of many separate items taken from the Montgomery-Ward Store in Ithaca at different times over a period of several months. The defendant gained access to the store on several of these occasions through arrangements made with the night watchman of the store. The products of these separate takings were mostly stored together and concealed in one room in the defendant's home. The two crimes of grand larceny, first degree, and concealing and withholding stolen property were separately charged in different counts in the same indictment. The defendant was convicted of both crimes and sentenced for a term of two to five years for each of the separate crimes. However, the two sentences imposed were to run concurrently.

Held, (1) The question of whether there was a unitary purpose in these thefts, so that they could be grouped together to sustain a conviction of grand larceny rather than separate individual petit larcenies, was one of fact for the jury, and the finding of the jury was supported by the evidence. (2) There can

be no doubt that a person cannot "receive" from himself the property he steals, as this would be a "curious anomaly." But the act of concealing what one has stolen is not so much of an anomaly, and it could consistently be declared a separate criminal act by the legislature. Thus the defendant can be separately convicted of stealing, and of concealing what he has stolen. *People v. Daghita,* 276 App. Div. 20, 92 N.Y. Supp. 2d 799 (1949).

In affirming the conviction, the court admits that the thief cannot receive from himself the property that he steals, citing *People v. Brien* 53 Hun. 496 (N.Y. 1889). However, the opinion points out that Section 1308 of the Penal Law contemplates two separable situations, either of which may constitute the crime defined in the statute; one, that a person may knowingly buy or receive stolen property, or two, that he may knowingly conceal or withhold stolen property, *People v. Vitolo,* 297 N.Y. 575, 74 N.E. 2d 552 (1947). In that case, the Court of Appeals affirmed the appellate division without opinion. The appellate division had affirmed the trial court's conviction of grand larceny, first degree, and concealing and withholding stolen goods, also without opinion (*People v. Vitolo,* 271 App. Div. 959, 68 N.Y. Supp. 2d 3). The dissenting opinion stated that it had been repeatedly held that a person could not be convicted of receiving or concealing the property which he had stolen citing among others *People v. Brien, supra; People v. Pollack,* 154 App. Div. 716, 139 N.Y. Supp. 831 (1913); *Smith v. State,* 59 Ohio St. 350, 52 N.E. 826 (1898). The facts show that the defendant Vitolo actively participated in the caption and asportation of the merchandise stolen, and that the merchandise remained in the unbroken possession of Vitolo until his arrest. The opinion points out that essential to Vitolo's original taking of the property was his fraudulent or felonious intention of permanently withholding it from its true owner. The crime of larceny is a continuing one and the subsequent withholding was the continuance of the same felonious act and the same crime, larceny, and not a new and separate crime of withholding. The dissent further states that under the People's theory, every thief who continues until arrested to withhold and conceal the property which he himself has stolen can be convicted of two crimes. It contends that the

legislature in passing Section 1308 of the Penal Law never intended this result. The statute did not aim to punish the thief by way of double penalty for a single criminal transaction.

The rule in other jurisdictions seems to be contra to the decision of *People v. Daghita.* In 136 A.L.R. 1088 it was stated "It is an elementary principal of the law that the principal in a theft, or the person who actually steals the property, can not be convicted of the crime of receiving, or concealing, or aiding in the concealment of the property stolen." Cases have held that a person may be convicted of receiving if the actual receiving was subsequent to the completion of the larceny and not a part of it and the receiver was not present at the larceny, even though as an aider and abettor he may be considered a principal under the Penal Law. *People v. Rivello,* 39 App. Div. 454, 57 N.Y. Supp. 420 (1899).

It seems that the instant case tends to resolve any doubts which may have arisen from the affirmance of *People v. Vitolo, supra.* as to the effectiveness of that decision in overruling the prior authority in this state on this question.

R. E. M.

CRIMES — NEGLIGENT HOMICIDE — TIME OF COMMISSION—Defendant contractors were indicted for negligent homicide as the result of the deaths of seven persons in a violent explosion which wrecked a housing project on February 19, 1946. The negligence consisted in failing to encase with concrete the gas pipes under the structure, according to specifications, which allowed a gas leakage causing the explosion. The omission complained of occurred between July 18, 1940, and May 6, 1942. In August, 1942, Article No. 32 of the Louisiana Criminal Code, defining the crime of "negligent homicide", under which this prosecution was brought, became effective. In *State v. Masino* et al.—La.—, 43 So. 2nd, 685, (1950), the Supreme Court of Louisiana, affirming an order quashing the indictment, held that as to the defendants Article No. 32 was an ex post facto law. The time of the crime was fixed as the time of the negligent acts or omissions, not the time of the resulting explosion.

Discussing ex post facto laws, the United States Supreme Court, in *Calder v. Bull,* 3 Dall. 386 (1798), said that it did not consider any law ex post facto, within the constitutional prohibition, that mollifies the rigor of the criminal law, but only those that create or aggravate the crime, increase the punishment, or change the rules of evidence, for the purpose of conviction. Applying the instant case to this authoritative definition, it becomes apparent that Article No. 32 is a mollification of the criminal law. Article No. 32 carries with it a penalty of imprisonment for not more than five years. Section No. 786 of the Louisiana Revised Statutes (manslaughter) which it replaced, provided for a penalty of a fine not exceeding $2,000, and imprisonment at hard labor for not longer than twenty years. The elements of the crime, rules of evidence, and procedure remain the same.

Article No. 32 was adopted in Louisiana, as in the majority of American jurisdictions, to overcome the disinclinations of juries to convict, under the name of manslaughter, for deaths caused inadvertently, however culpable the negligence. This aversion is particularly noticeable in cases of deaths resulting from motor vehicular accidents. It cannot be seriously contended that the accused has any vested interest in this jural abhorrence of the term "manslaughter," but this psychological factor is the only change wrought by Article No. 32 to his detriment. Citing 11 *Am. Jur.* 348, the majority found that the statute "altered the situation of the accused to his disadvantage," and thus was ex post facto. 11 *Am. Jur.* 362 states that, "If an act is criminal and punishable when committed, and a statute is subsequently enacted also making it criminal and punishable; but giving the crime a designation not before given to it, the situation of the accused is not altered to his disadvantage and, accordingly, such a statute is not an ex post facto law."

To find that the law was ex post facto, it was necessary to establish that the crime (negligent homicide) was committed during the construction of the housing project, (1940-1942) although no death took place until 1946. In so finding the majority relied on two cases, *State v. Wallman,* 31 La. Ann. 146 (1879), and *State v. Hobbs,* 33 La. Ann. 226 (1881), in both

of which the defendant sought a reversal of his conviction because the indictment charged the commission of the crime on the date the fatal blow was struck, while in each case death ensued shortly thereafter. Both convictions were sustained, but a fact common to both was that an act of violence was visited upon the victim on the date specified. In *State v. Taylor,* 31 La. Ann. 851, decided the same year as the *Wallman* case, the court refused to extend the doctrine, stating, ". . . the death of the victim struck completes the crime of murder, or of manslaughter, but that [the blow] alone did not constitute the crime; that unless death ensues the felony is not murder or manslaughter, but another, lesser offense. [The victim's] death completed a crime which—until it occurred—could not, as such, have been made known to, investigated or prosecuted by a public officer."

The New York view is expressed in *People v. Buddensinch* 103 N.Y. 487, 9 N.E. 44, (1886). A negligently constructed building collapsed, causing a death. An indictment was sustained which recited negligent acts of the accused which were deemed to be of a continuing nature, and obtained up to the day of the catastrophe.

The statute of limitations applicable to the crime of negligent homicide in Louisiana is one year after the facts of the crime have been brought to the attention of the proper public official, (district attorney, sheriff, etc.). Were it not for the saving feature of this discovery rule, a situation could exist in Louisiana whereby the time limited for bringing a prosecution could expire before the necessary elements of the crime existed. In the instant case the negligent act was committed between July 18, 1940, and May 6, 1942. If the act occurred at the earlier date, five years and seven months had elapsed when, on February 19, 1946, the death of a human being completed the requisite elements of the crime of negligent homicide.

F. A. M.

HUSBAND AND WIFE — ANNULMENT — RIGHT OF THIRD PARTIES TO CONTEST VALIDITY OF FOREIGN DIVORCE—An action to annul a marriage on the ground that at the time of the marriage the defendant was married to an-

other woman. There was a decree of divorce issued in the State of Florida which purported to terminate that earlier marriage. The proof was conclusive that, although both parties appeared in that action, the testimony of the plaintiff wife therein as to residence was false and that the jurisdictional requirements for a divorce in Florida were not established and were in fact nonexistent. The defendant, in the immediate case, claimed that plaintiff could not contest the validity of the Florida divorce because of the appearance of both of the parties to it and the recitals in the Florida judgment as to the domiciliary requirements. *Held,* plaintiff wife, as third party, may question the recitals with respect to domicile, and as they are indisputably false, she is entitled to a finding that defendant's divorce was invalid and her marriage to him should be annulled. *DeMarigny v. DeMarigny,* 196 Misc. 719 (1949).

This case is apparently inconsistent with the holding in *Bane v. Bane,* 196 Misc. 318 (1948), wherein the same court, in an action for an annulment on the ground that the defendant husband was married at the time of his marriage to the plaintiff, held that the plaintiff wife was precluded from collaterally attacking a Florida divorce in which proceeding both the defendant and his first wife appeared and wherein a full opportunity to litigate all the issues including that of jurisdiction was presented. Nor is the apparent inconsistency of these two cases resolved by the holding in the case of *Vrquhart v. Vrquhart,* 272 App. Div. 60, 69 N.Y. Supp. 2d 57 (1947), wherein the court permitted a child of a dissolved marriage to question the decree. This conclusion was justified on the ground that the state's interest in preserving the legitimacy of a child was a circumstance paramount to other considerations.

It would appear that the predominate weight of authority in this state is against the holding in the case of *DeMarigny v. DeMarigny, supra* and consistent with that of *Bane v. Bane, supra* unless those two cases can be reconciled by some theory other than res judicata or full faith and credit. In this state, in personal appearance cases, a foreign divorce decree may not be attacked collaterally where the issue of residence or domicile was contest-

ed in the foreign jurisdiction, *Tiedmann v. Tiedmann,* 172 App. Div. 819, 158 N.Y. Supp. 851; *Schneider v. Schneider,* 232 App. Div. 71, 249 N.Y. Supp. 131, aff'd. 263 N.Y. 641; nor may it be collaterally attacked where, although the opportunity to do so was present, the issue was not litigated, *Kinnier v. Kinnier,* 45 N.Y. 535 (1872). In this case, a second spouse sought an annulment on the ground that a prior Illinois judgment of divorce obtained against his wife by her former husband was void, although she had appeared and answered in the Illinois action. In sustaining a demurrer and dismissing the complaint, the court pointedly said: "If the Illinois judgment was binding on the parties to it, and if the defendant and her former husband were divorced by that judgment, as between themselves, their marriage was not in force when the plaintiff and defendant were married." The court took notice of the fact that the question of residence was litigated in the Illinois action, but it stated that its decision would not have been different if the question hadn't been litigated because a full opportunity to do so had been presented.

This New York position with regard to collateral attacks by third parties is consistent with the Federal position as evidenced by the following cases: *Sherrer v. Sherrer,* 334 U.S. 343; *Coe v. Coe,* 334 U.S. 378 and *Davis v. Davis,* 305 U.S. 32. In these cases the Supreme Court has made it clear that the full faith and credit clause applies to those divorces based on the domicile of one spouse only where the nonresident spouse appeared in the action, and by the filing of an answer, had opportunity to litigate the bona fides of the alleged domicile of the moving party. It is now the law that on such facts, a re-examination of the matters litigated, or which could have been litigated in that action, is forbidden under the full faith and credit clause. Therefore, no evidence tending to impeach the issues which could have been raised and which were actually litigated in such divorce actions can be received in a sister state.

Although the *DeMarigny* case, *supra* is apparently inconsistent with the New York and Federal positions because of the opportunity in that case to litigate the issue of jurisdiction. The

DeMarigny case may be reconciled with the prevailing view, if in that case (though it doesn't appear in the reported facts), the plaintiff wife was aware of the Florida divorce decree and in reliance thereon married the defendant. That this would effect an estoppel barring any action by the wife for an annulment on the ground that her husband was married at the time of their marriage is indicated by the case of *Kaufman v. Kaufman,* 177 App. Div. 162, 163 N.Y. Supp. 566. In that case a second husband was denied an annulment of his marriage with the defendant because the facts conclusively showed that the husband was not only aware of his wife's divorce, but had induced her to obtain it. That such is the law of this state when a complaining party had actual knowledge of his mate's former marriage and divorce is further indicated by the case of *Krause v. Krause,* 282 N.Y. 355, 26 N.E. 2d 290. Therein it was held that a defendant husband in an action for a separation could not plead, as a separate defense, that he lacked capacity to marry the plaintiff because the court which, upon his petition, purported to accord him a divorce from his first wife never obtained jurisdiction.

A. F. M.

UNEMPLOYMENT COMPENSATION — COUNTER-CLAIMS AGAINST THE STATE — The State of West Virginia, by its Director of Unemployment, filed a notice of motion for judgment against the Ruthbell Coal Co. to recover delinquent payments to the unemployment fund. The defendant coal company filed a counterclaim to recover a refund for allegedly illegal overpayments of contributions. The question arose as to whether or not the counterclaim constituted a suit against the state within the purview of the immunity clause of the West Virginia Constitution. (Article VI, Section 35, West Virginia Constitution).

The court decided that the interposing of the counterclaim was permissible for two reasons. They first noted the nature of the fund itself. Under the laws of that state, the unemployment compensation fund was established separate and apart from all other public funds (Article 8, Chapter 1, Acts of the Legislature,

Second Extraordinary Session, 1936). The state is under no direct liability for the fund, nor do any benefits accrue to the state as a result of it (Sec. 19, Article 5, Chapter 130, Acts of the Legislature, 1945; Sec. 5a, Article 9, Chapter 130, Acts of the Legislature, 1945). They, therefore, *held* that the state was not a real party in interest in the proceeding. *State v. Ruthbell Coal Co.,* 56 S.E. 2d 549 (1950).

Other cases holding that actions against state agencies were actions against the state itself were distinguished on the ground that the defendants in those cases were direct government agencies and therefore the state had a real financial interest in the litigation since funds from the state treasury were used to maintain the agency involved. *Miller v. State Board of Agriculture,* 46 W. Va. 192, 32 S.E. 1007 (1899); *Stewart v. State Road Commission,* 117 W. Va. 352, 185 S.E. 567 (1936); *Barber, Admx. v. Spencer State Hospital,* 95 W. Va. 463, 121 S.E. 497 (1924). In *Mahone v. State Road Commission,* 99 W. Va. 397, 129 S.E. 320 (1925), a similar result was reached by holding that the state had delegated its duties to the agency, and a plaintiff could acquire no greater rights against the agency than could be asserted against the state itself. This case was a tort action, however, and the court in the principal case points out that any payment for the liability incurred would necessarily come from the state treasury.

In New York, the provisions of the unemployment compensation fund are somewhat similar. Here, the Commissioner of Taxation and Finance, as custodian, is bonded separately for the amount of the fund, and although it is deposited with other state funds, interest accruing thereon is placed to the credit of the unemployment fund alone (Labor Law, Title 4, Sec. 550 (2). Further, the act expressly repudiates any liability for the administration of the fund on the part of the state beyond the amount of money received through allotment by federal agencies (Labor Law, Title 4, Sec. 550 (4)). Although administrative details are dissimilar, it can be seen that both funds were established with the idea that the state should undertake a minimum of lia-

bility for them and also that there should be some degree of separateness between these funds and other state funds.

In *Manufacturer's Trust Co. v. Corsi,* 186 Misc. 577, 61 N.Y. Supp. 2d 769 (1946), an original action against the State Industrial Commissioner, a New York court held that the state is a real party in interest, and any action against it would have to be taken in the Court of Claims. The reason for this conclusion was stated to be that any successful recovery by the plaintiff would diminish the amount of money available for use by the state for the relief of unemployment. This reason was not discussed in the principal case.

A further reason advanced by the West Virginia Court for allowing the counterclaim even if it could be found that the plaintiff was a direct governmental agency, was stated to be that the state had discarded its immunity by choosing that particular forum and it was therefore subject to all procedural rules governing other litigants. This reasoning is closely akin to that used by the federal courts in cases where foreign sovereigns have sued in our courts and counterclaims have been filed against them. *The Gloria, Kingdom of Norway v. Federal Sugar Refining Co.,* 286 Fed. 188 (S.D.N.Y. 1923). These courts have held that the right to counterclaim is more than a mere procedural method and it affects the substantive rights of the parties since it is in the nature of a defense. The West Virginia Code provision stating that a counterclaim shall be deemed an action against the plaintiff is explained as referring merely to rules of procedure and therefore has no application to this case. (Section 56, Article 5, Chapter 9, West Virginia Code).

The allowing of a counterclaim under these circumstances has been the law of West Virginia and other jurisdictions for so long that it would be unworthy of note were it not for the fact that the court in this case stated that to hold oherwise would be a denial of due process under the Fourteenth Amendment to the Federal Constitution. This was stated in spite of the fact that West Virginia has a Court of Claims for remedies against the state. (Michie's West Virginia Code, Chapter 20).

In *People v. Greylock Construction Co.,* 213 App. Div. 21, 209 N.Y. Supp. 735 (1925), New York held that counterclaims against the state are not allowable and if *Manufacturer's Trust Co. v. Corsi, supra* is followed, it is doubtful that the ruling in the West Virginia case would be applied in this jurisdiction. Whether or not the inability of a defendant to counterclaim under these circumstances in New York is a denial of due process has never been decided. In view of the appropriate remedies available in the Court of Claims, it seems extremely unlikely that any constitutional rights have been violated by denying a right to counterclaim.

G. J. N.

WILLS — DECEDENT ESTATE LAW — ELECTION TO TAKE INTESTATE SHARE—Testator stated in his will, among other things, that he had made an oral agreement with his wife whereby he had transferred to her certain described shares of stock in consideration of her relinquishing her ". . . dower and other statutory interests" in his estate; and that ". . . in the event my said wife shall disaffirm the aforesaid agreement and shall endeavor to exercise a right of election to take some part of my estate, and in the event it shall be finally determined that my said wife may exercise such right of election, I give, devise and bequeath to my trustee . . . the exact proportion of my net estate, and no more, not exceeding in any event one-third (1/3) thereof, to which my said wife may be determined to be entitled, in trust . . . to pay the income thereof to my wife . . . for and during the term of her life."

The widow disregarded the agreement, and sought to elect against the will under section 18 of the Decedent Estate Law. Against the executor's protest, it was held that the widow could exercise her personal right of election under section 18, and the decedent's attempt to bar this right was invalid. *Matter of Richmond,* 276 App. Div. 271 (1950).

The problem here presented for the court was whether a testator could make a testementary trust contingent upon the action of the surviving spouse to elect under section 18 of the Decedent Estate Law when the will was offered for probate.

The court relied upon *Matter of Filor,* 267 App. Div. 269, 45 N.Y. Supp. 2d 376, affirmed 293 N.Y. 699 (1943). In that case, the testator had stated in his will, ". . . to my wife . . . I leave nothing," with the proviso that ". . . in the event . . . she should prevail in an election to take against this my Will, then so much of my estate as shall equal what she would be entitled to upon such election shall be put in trust with the trustees . . . , the income . . . to be paid to her for life . . . ." Holding this language ineffective to bar the widow's election under section 18, the court said: "The widow is entitled to take an intestate share, unless the testator provided for her in his will . . . There is no dispositive provision for her. The testator undertook to set up his own distributive scheme to be operative in the event that she prevailed in an election to take against the will. His method is in conflict with the statute defining the widow's intestate share (Decedent Estate Law section 83) and therefore cannot be effectuated."

The court, in the principal case, distinguished the case of *Matter of Williamson,* N.Y.L.J., January 23, 1942, page 347, column 6. There the testator made an affirmative provision for his wife in his will. In a codicil he inserted a provision to the effect that ". . . if my wife . . . shall elect or attempt to elect to take any part of my estate against the provisions of my said will, then and upon the happening of such event . . ." a trust of an amount equivalent to the wife's intestate share was to be established for her benefit. The court allowed the provisions of the codicil to stand, and denied the widow her right to elect.

In the principal case, as in *Matter of Filor, supra,* the testator did not provide for the surviving spouse in an absolute sense. His will contained no provision for her. It did allude to an oral agreement with respect to which the testator alleged performance on his behalf. However, an agreement between a testator and his wife to be binding and enforceable to bar her elective participation in the estate must be in writing. Decedent Estate Law, section 18, subdivision 9. The provision setting up the trust was a contingent one, depending upon the success of the wife in her suit to elect against the will. Consequently there is no provision at all

for the wife in the will, and under the statute she is then permitted to elect to take her share.

The principal case is not an application of the rule that a testamentary trust must be unconditional to be valid. *Re Fleischman's Estate,* 189 Misc. 655, 72 N.Y. Supp. 2d 456 (1947). A conditional trust (*e.g.* ". . . for life, or until she remarrys . . .") is not "for life" as required by the statute (Decedent Estate Law, section 18, subdivision 1 (b), (d), (e)), and an election may be had. *Re Bogin's Estate,* 68 N.Y. Supp. 2d 132 (1946). The principal case does seem to conform to the court's previously manifest disposition to construe section 18 liberally in favor of the surviving spouse, a disposition recognizing the Legislature's intent in enacting section 18 to protect such spouse against disinheritance. *Re Moore's Estate,* 165 Misc. 683, 1 N.Y. Supp. 2d 281, affirmed 254 App. Div. 856.

A. A. K.

WORKMEN'S COMPENSATION — NEGLIGENCE — ELECTION OF REMEDIES—Plaintiff, a janitor employed by the defendants, was injured in the course of his employment. He filed a claim for Workmen's Compensation. At the hearing the employer's attorney disclosed that his client had failed to secure workmen's compensation to his employees as required by the Workmen's Compensation Law. The attorney for the employee thereupon stated that a common-law action for negligence would be commenced against the employer pursuant to the provisions of section eleven of the Workmen's Compensation Act. Thereupon, the referee closed the case on that ground but the claim was never withdrawn. On the trial of the negligence action at the close of the plaintiff's case, the trial court dismissed the complaint on the merits for failure of proof of negligence. Thereafter, the claimant applied to the Workmen's Compensation Board to reopen his claim on the ground that he prosecuted his action for damages in the Supreme Court in the mistaken belief that the defendant was guilty of negligence. The employer contended that when the plaintiff chose to pursue his common-law

action, he made a conclusive and binding election of remedies and that he is forever precluded from seeking compensation.

Held: The plaintiff is entitled to compensation under the Workmen's Compensation Act, no binding election of remedies having been made. The majority of the court stated: "Claimant never had but one remedy—the right to compensation. He had no remedy at common law. Apparently he thought he had, and instituted a fruitless action. The elements required to be proven were not the same. To be successful in the Supreme Court action he had the burden to establish negligence on the part of defendants. This he failed to do. In prosecuting his claim for compensation, negligence is not an issue. The legal effect of what he did was not to make a choice between inconsistent remedies, but a futile attempt to pursue a remedy not available to him. The judgment in the negligence action is no bar to a claim for a sufficient cause. The fact that the claimant sought to avail himself of a remedy denied to him by law does not warrant the conclusion that because of his mistake, we must now hold that he thereby renounced forever the only remedy he had." *Matter of Tate v. Estate of Dickens,* 276 App. Div. 94 (1949).

In the principal case, the defendant-employer relied upon *Pavia v. Petroleum Iron Works Co.,* 178 App. Div. 345 (1917) and *Crinieri v. Gross,* 184 App. Div. 817 (1918) to sustain his contention that an election of remedies had been made.

The *Pavia* case involved an employer who failed to secure compensation. The employee was aware of this fact. With that knowledge, he participated in proceedings before the State Industrial Commission (now the Workmen's Compensation Board), after which an award was made to him. The employee refused the award when tendered to him by the employer. The employee filed with the commission a statement that he withdrew his claim for compensation, stating that it was his intention to prosecute his common-law remedy. The Commission denied the application to withdraw his claim. The Appellate Division affirmed the Commission, stating: "With full knowledge of the situation therefore, before an award was made and with competent counsel to guide and advise him, the claimant permitted an award to be made in

his favor and thereby most effectually confirmed his election to accept such remedy as was afforded him by the Workmen's Compensation Law. There is no pretense that he did not fully understand his rights before the award was made. A party cannot experiment with the Commission for the purpose of ascertaining how much compensation may be awarded him and then if dissatisfied repudiate the award and seek the other remedy permitted by the statute. His election once made intelligently and with knowledge of the facts should be conclusive."

In the *Crinieri* case *supra,* a claimant, having been injured in an accident, brought an action to recover damages against one Marie Gross alleging that she was his employer, that she failed to secure compensation for her employees, and that he was injured through her negligence. In her answer she alleged that the employer of the claimant was not herself, but her husband. The complaint was dismissed on that ground. The claimant then filed a notice of claim in which he alleged that Louis or Marie Gross was the employer. The Commission made an award against both of them and found that they were both employers of the claimant. The Appellate Division reversed the award as to Louis Gross on the ground that there was no legal evidence in the record that he was the employer. It reversed the award against Marie Gross also on the ground that the question of whether or not she was an employer had been determined in the common-law action.

The Appellate Division in deciding *Matter of Tate v. Estate of Dickens* stated that the *Crinieri* and *Pavia* cases were not determinative of the question presented. However, one judge dissented, and in doing so cited the *Crinieri* and *Pavia* cases in support of the proposition that a binding election of remedies had been made.

Where the employee brings an action which ends in failure, there is a conflict of authority as to whether or not the unsuccessful employee can recover under the workmen's compensation law.

In *San Francisco Stevedoring Co. v. Pillsbury,* 170 Cal. 321, 149 P. 586 (1915), a demurrer to the employees complaint was sustained in a common-law action under a statute giving the employee the right to proceed at his option under the workmen's

compensation law, or at common-law where the conduct of the employer amounted to gross negligence or willful misconduct. It was held that the judgment of the Superior Court simply determined that the allegations of the complaint failed to state a case of this character, and that the proper tribunal for the adjudication of the claim was the Industrial Accident Commission.

In *Calandra v. Standard Bitulithic Co.* 9 N.J. Misc. 1307, 157 A. 567 (1931), the court stated: "We think the petitioner was not estopped from denying that the contract was governed by the provisions of the Act by reason of the fact that he began a suit in the Essex circuit court on account of his injury, which suit resulted in a non-suit."

In *Bailey v. Alexander Realty Co.* 342 Pa. 362, 20 A. 2d 754 (1941), judgment was rendered against the plaintiff in a common-law negligence action. It was held that the plaintiff was not barred from prosecuting a claim under the Workmen's Compensation Law.

Authorities to the contrary include *Strong v. New Hampshire Box Co.,* 82 N.H. 221, 131 A. 688 (1926), where the plaintiff brought a common-law action, a non-suit was granted, and judgment was given in favor of the defendant. It was held that the plaintiff was barred by the terms of the Workmen's Compensation Law from commencing an action for compensation.

In *Industrial Commission v. Schaefer Realty Co.,* 98 Colo. 445, 56 P. 2d 51 (1936), where the employer failed to comply with the insurance features of the Act, the employee was given the right to proceed, at his option, either under the Act or by a common-law action for negligence. The employee brought an action of the latter sort, but there the judgment went against him. He then attempted to fall back upon the procedure established by the Act. It was held that the employee had made an election of remedies, by trying and failing to recover in the common law action. The remedies, it was said, are inconsistent.

In *Hudgins v. Nashville Bridge Co.,* 172 Tenn. 580, 113 S.W. 2d 738 (1938) it was held that under the Tennessee workmen's compensation law, the institution of an action at law by an em-

ployee for injuries does not operate as a waiver to sue for compensation until final judgment is obtained in the action either allowing or denying recovery.

From an investigation of cases dealing with the subject of election of remedies in workmen's compensation, the trend of the law seems to permit a claim under the workmen's compensation law even after the prosecution of an unsuccessful common-law negligence action.

N. A. B.

Legislation

Introduction. This section is devoted to noting, as far as publishing date would permit, the statutory changes enacted by the 1950 New York Legislature which it is felt are of general interest to attorneys. Additional changes and more detailed coverage will be given in the January issue.

CIVIL PRACTICE ACT

Section 28-a Added[1]*—Statute of Limitations*

The addition of this section provides for a suspension of the statute of limitations during the period in which a non-enemy person entitled to maintain an action here was a resident of, or sojourner in, an enemy country or enemy-occupied territory during war.[2]

The act effects a revival of actions of this type which have already been barred by the running of the statute except where property rights have vested as a result of the bar.[3] The extension of the time for commencement is limited to one year after the effective date of the section.[4]

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1 L. 1950 c. 759.

2 September 1, 1939-August 14, 1945.

3 Effective immediately.

4 The question of the constitutionality of reviving barred actions also arose in the amendments of Sections 27, 28, Laws of 1949. For a brief comment on this problem see Albany Law Review, Vol. 14, No. 1, p. 23.

Sections 171, 172, 173, 174, repealed[1]*—Tender after suit*

Several times since the inception of tender after suit in the revised statutes of 1829, advisory bodies have sought its repeal. The latest recommendation for repeal of the four sections came from the Judicial Council in 1949. The Council stated that the provisions for tender after suit, were a limited procedure, unnecessary, and a duplication of more desirable and uniform methods. The provisions constituted a source of error and confusion with the procedure used in cases of tender before suit.[2]

Experience has shown that the practice of tender after suit was very infrequently used, for defendants were reluctant to deposit such large sums of money in court. The present practice of informal settlement out of court or an offer to compromise under Civil Practice Act section 177, can effect the purposes of tender after suit i.e. reduce the amount of litigation handled by the courts, and provide a method by which the defendant may be saved costs from the time of tender.

Section 210 Amended[1]*—Real Party In Interest.*

The amendment broadens the exceptions to the real party in interest rule so as to allow an insured person, corporation, joint-stock association or other unincorporated association which has executed a loan receipt agreement with an insurance company to sue in their own name. This avoids the prejudicial disclosure of the identity of the insurer who has paid the claim and for whose benefit the action is now maintained.

Formerly, the loan receipt arrangement to continue the insured as the real party in interest had only been upheld in the First, Second and Fourth Departments and even there it was subject to separate trial of the issue as to the validity of the receipt when

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1 L. 1950, c. 78.

2 Fifteenth Annual Report of the Judicial Council, pp. 53 and 189 (1950).

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1 L. 1950 c. 529.

this was interposed as a defense. The loan receipt was therefore usually an unsatisfactory device.

For a more complete discussion of the effect of this change, see the Comments Section, this issue.

Section 487 Amended[1]*—Determination by clerk of amount of default judgment.*

The amendment provides that in cases in which final judgment may be entered by the clerk without application to the court, as provided in section 485, the amount of the judgment may be determined only upon submission of a verified complaint.

This change eliminates in all cases, any assessment by the clerk as was necessary under former Section 487 when an unverified complaint was served. It also clarifies Section 486 which had intimated that a notice might be sufficient when filed with the clerk in lieu of a complaint.[2, 3]

Sections 1435 subdivision 9 amended.—Summary proceedings for real property.

An amendment of subdivision nine, of section fourteen hundred thirty-five of the Civil Practice Act, continues subdivisions four, five, six, seven, and eight of this section until July 1, 1950.[1]

Subdivisions four to eight inclusive, allow a court to stay the issuing of a final order for the delivery of possession of premises occupied for dwelling purposes. The granting of the stay is within the discretion of the court, and is not allowed to exceed four months. The stay is to be granted if the applicant has made rea-

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1 L. 1950 c. 123.

2 Carr v. Cunningham, 196 Misc. 198, 91 N.Y. Supp. 2d 858.

3 No substantial change in today's practice is occasioned by this amendment. It aids in the establishment of a well-defined and uniform procedure and the elimination of doubts as to the nature of proof required on an assessment or the necessity of notice to a defendant who has appeared in the action.

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1 L. 1950, c. 501.

sonable and diligent efforts to secure other premises, but has been unsuccessful; or if the eviction would cause the applicant severe hardship. The court upon granting the stay may require the applicant to deposit the reasonable rent for such premises, with the court.

If a landlord is demolishing a building, for purposes of approved new construction, or if the tenant is an objectionable person the provisions of these subdivisions do not apply.

Section 1535 Amended[1]*—Retaxation of Costs*

The amendment allows a plaintiff to submit only a copy of the bill of costs as taxed, to the defendants attorney, who then has the burden of carrying forward any further action by the submission of a notice of retaxation within ten days after receipt of the bill of costs.

Formerly the plaintiff had to send both a bill of costs and a notice of retaxation to the defendants attorney, and then appear at the time designated by the notice of retaxation whether the other party appeared to dispute, or not.

This change simplifies the process and occasions the appearance of both parties only when there is a dispute of the bill of costs.

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1 L. 1950 c. 519.

CODE OF CRIMINAL PROCEDURE

Section 550 amended—Admission to bail, defined.

A new amendment to section 550 of the Code of Criminal Procedure allows any county judge to admit a defendant to bail, when he is held to appear for examination.[1]

The section in the past permitted bail to be taken from a defendant to appear for examination, by any justice of the Supreme Court, any judge of the court of general sessions, the magistrate who issued the warrant before whom it was returnable, or if both are incapacitated and the amount of bail has been fixed, by any other magistrate of like jurisdiction.

1 L. 1950, c. 625.

DOMESTIC RELATIONS LAW

Penal Law Section 511 and 341 Amended; Domestic Relations Law Section 6 Amended.[1]*—Consequence of Sentence to imprisonment for life, parole.*

This series of amendments make it possible for a paroled life convict to marry with the permission of the Board of Parole. Under the prior law, a paroled "lifer" could not contract a valid marriage, according to the Attorney General.[2]

Formerly section 511 merely provided that one sentenced to life imprisonment was civilly dead; but under the amended statute if he is otherwise capable of contracting a valid marriage, he may marry while on parole.

Penal Law Section 341 provides four exceptions to the definition of bigamy found in section 340. The conforming amendment to section 341 makes it bigamy under the present law to marry while having another living spouse, except where such spouse has been finally sentenced to life; but this exception shall not apply where the former marriage was contracted pursuant to Penal Law section 511. The amendment to Domestic Relations Law Section 6 is identical in wording to that of Penal Law Section 341, and merely adds appropriate language to the definition of void marriages.[3]

One restriction is made upon the right of a paroled life convict to marry, namely that he must obtain written consent of the Board

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1 L. 1950 c. 144.

2 1947, Opinions of the Atty. Gen. 92, 93.

3 These changes were recommended by the Law Revision Commission. See Leg. Doc. (1950) No. 65. One reason behind the recommendation of the commission was the result of a Department of Justice survey of rehabilitation among parolees, which showed that out of some 85,000 cases, a parolee who married was more likely to become a law-abiding citizen than one who stayed single. See 4 U.S. Atty. Gen. Survey of Release Procedures, 342-352, (1939).

of Parole, and failure to procure such consent is ground for revocation of parole. In this respect, an interesting question arises as to whether a marriage contracted by a paroled life prisoner without the permission of the board would be valid.

There may also be some question as to whether the amendment statutes apply to a paroled life convict who was previously married. It is established by *In re Lindwall's Will,* 287 NY 347, 39 N.E. 2d 907, 1942, that the life sentence affects the marital relation at least to the extent of liberating the innocent spouse and his or her property from all property obligations arising from the marriage. The same case also holds that the marriage is voided to this extent by the sentencing itself, and no judicial announcement of its dissolution is required. In this respect, the precedent of the *Lindwall* case is closely followed in *Wilder v. Wilder,* 181 Misc. 1059, 74 N.Y.S. 2d 181, 1943, where the court refused to render a declaratory judgment declaring a marriage void, at the suit of a person whose spouse had since been sentenced to life imprisonment, on the ground that such a judgment was unnecessary. Correction Law Sections 320, 322, and 325 provide for the appointment of a committee for a life convict upon the application of the innocent spouse, and payment of income or principal of the prisoner's estate to be devoted to the support of such persons as the convicted person would be legally liable to support had he not been convicted. In addition, however, it provides for the return of such property as remains to the prisoner upon his release by pardon or commutation of sentence. Thus it would seem that upon such release, the life convict resumes his marital obligation to support his legal dependants. But it is clear that in general he is not returned to the rights of a previous marriage, for Domestic Relations Law Section 58 so provides.

It was said in the *Lindwall* case, *supra,* that "civil death was given the same effect as natural death at common law and in equity only in so far as was required for the protection of wife and child." The court there, regarded the above provisions of the Correction Law as indicative of a similar attitude on the part of the legislature. This expression of the Court of Appeals plus the statutory provisions mentioned above seem to give ground

for belief that the amendment to Penal Law Section 511, will be applied to a paroled life prisoner who was previously married only where the remarriage of the parolee would not impair the rights of the former spouse or their children to the parolee's property.

EMERGENCY HOUSING RENT CONTROL LAW

Amended—generally.

The legislature, anticipating the termination of federal rent control on June 30, 1950, has amended the Emergency Housing Rent Control Act.[1] The state regulation shall supersede and be in lieu of the federal controls. The governor will notify the federal housing expediter, and thus under the Federal Housing and Rent Control Act of 1947[2] the federal control will be at an end.

The state rent administrator is now head of the Temporary State Housing Rent Commission. The act becomes effective on May 1, 1950 and establishes rents at the levels which existed on March 1, 1950, in areas where federal or local laws controlled rents. Wherever a conflict exists between the maximum rental charge as fixed by federal law, and that fixed by local law, the local law shall prevail. Where an adjustment has not been made since March 1, 1949, for new services or facilities furnished by the landlord, the maximum rent shall include this adjustment as granted by the Rent and Housing Act of 1947.[3] The Commission may also extend control to areas which are not now subject to regulation.

Certain housing facilities are exempted from state control, these include, (a) institutions operated for a charitable or educational purpose on a non-profit basis, (b) transient accommodations in hotels, (c) motor courts operated on a transient basis,

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1 L. 1950, c. 250.

2 USCA Tit. 50 App. section 1894.

3 Ibid.

(d) furnished accommodations within the landlord's own dwelling unit, if no more than two tenants are accommodated, (e) buildings erected under public housing laws, (f) housing accommodations operated exclusively on a non-profit basis (g) housing completed after February 1, 1947.

No later than July 1, 1951 the Commission is to provide regulations, for a landlord and tenant, to agree on a voluntary basis what a fair rental charge shall be.

Within thirty days after the act becomes effective the Commission is to begin a survey in all New York state, and particularly those areas subject to rent control to gather data to aid in the determination of fair and equitable rents. A reasonable time after the completion of this survey but not later than December 1, 1950, the Commission must provide regulations for individual adjustments of rents, where they are reasonable, as a result of increases in operating expenses which have increased them beyond the rental income of the property.

On or before January 15, 1951 the Commission is to submit to the legislature, a rent control plan which is designed to maintain a system of rent controls at levels, which in the judgment of the Commission are fair and equitable, and will provide an orderly transition from and termination of rent controls. This rent control plan will take effect March 1, 1951 unless by February 15, 1951 the legislature adopts a joint resolution disapproving such regulations.

Decontrol of rents within an area will be accomplished whenever the Commission finds, the percentage of vacancies in a given area is over ten percent, or the availability of housing in and other factors are such that rent control is no longer necessary. The abolition of controls shall take place only after public hearing at which all persons interested have been given a reasonable opportunity to be heard. In addition local governing bodies may after a public hearing request the Commission to decontrol housing in a municipality, and if the Commission shall find controls are no longer needed, rent regulations in that area may be abolished.

Under the new State Commission a tenant may be evicted only for non-payment of rent, maintaining a nuisance, refusing to renew a lease for less than a year, refusing the landlord access to the premises to show it to a prospective vendee or mortgagee, or where the landlord seeks possession of the premises for his own personal use.

In addition actions for increases under federal controls but which are contrary to local laws are taken from the jurisdiction of New York courts. The section however does not give anyone who may have paid an increased rent, pursuant to such federal order, the right to recover rent so paid.

GENERAL MUNICIPAL LAW

Section 50-e Amended[1]*—Notice of Claim*

Upon the recommendation of the Judicial Council,[2] subdivision 1 has been amended to provide a ninety day period in which to file notice of claim in tort, where necessary, to commence an action or special proceeding against a public corporation. The prior period was sixty days.

Subdivision 6 has been amended to allow correction of non-prejudicial errors at the trial, as well as before the trial as had formerly been necessary.

This entire section, 50-e, was added by chapter 694 of the laws of 1945 to provide for a uniform and equitable notice of tort claims procedure throughout the state superseding the inconsistent general, special and local laws. The passage of the present two amendments completes the change recommended by the Judicial Council.

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1 L. 1950 c. 481.

2 Twelfth Annual Report of the Judicial Council pp. 21-23; 59-60 (1946).

LIEN LAW

Article 8, Section 189 amended, new subdivision 6-a added.[1] *Conforming amendment to section 374-a of the Civil Practice Act—Liens of Hospitals.*

A new subdivision, 6-a, has been added to section 189 of the Lien Law. The new subdivision provides that at any time after the hospital files and mails notice of its lien, as provided in subdivision 1, the injured person, his legal representative in case of death, the hospital, or the one alleged to be liable for the injuries can apply for an order determining the validity of the lien and fixing its amount, which amount shall be the extent of the lien under section 189.

Prior to the addition of this subdivision, the courts refused to fix the amount of the lien prior to the consummation of the settlement, since there was no provision in section 189 for testing its validity in such a manner.[2]

In recommending this amendment, the Law Revision Commission said: "The absence of a means of determining promptly the validity of the lien or the amount thereof prior to judgment tends to impede settlements of personal injury actions in cases where it is claimed that the amount of the lien is excessive. This situation can result, and sometimes has resulted in injustice to the injured person."[3]

Section 374-a of the Civil Practice Act was amended to complement the amendment to section 189 of the Lien Law. The amendment to this section provides that in an action under sec-

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1 L. 1950 c. 656.

2 Finkel v. Dushner, 183 Misc. 64, 48 N.Y.S. 2d 717, aff'd 268 App. Div. 912, 51 N.Y. Supp 2d 756 (1944).

3 Leg. Doc. (1950) No. 65 (B).

tion 189 to determine the validity and extent of a hospital lien, the hospital bills may be introduced a prima facie proof of the fact of services rendered and of the reasonableness of the charges, provided they do not exceed the usual ones in compensation cases.

Article 10, Section 235 amended[1]*—Filing of Chattel Mortgages.*

The ambiguity present in this section as to computation of the period within which a chattel mortgage must be refiled has been cured by this amendment. The amendment states explicitly that the date of refiling shall be computed from the anniversary of the original filing of the mortgage in all cases, and not from the date of the last previous filing. This change was recommended by the Law Revision Commission.[2]

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1 L. 1950, c. 733.

2 Leg. Doc. (1950) No. 65 (G).

MEMBERSHIP CORPORATIONS LAW

Section 21, amended,[1] *Purchase, sale, mortgage, and lease of real property.*

A new amendment to section twenty-one of the Membership Corporation law allows a county court to approve the sale or mortgage of a piece of real property by a membership corporation, if all or part of the real property is situated within the county.

In the past sales and mortgages of real property, by membership corporations, had to be approved by the supreme court of the judicial district in which the land was situated.

By the new amendment all proceedings previously conducted in county court, permitting a membership corporation to sell or mortgage real property, are ratified and confirmed.

Section 57 added,[1]*—Dissolution of Membership Corporations.*

A new section, fifty-seven, has been added to article eight of the Membership Corporation law. This section requires all membership corporations, organized prior to January 1, 1948, to file a certificate of report of existence, at some time prior to June 15, 1951.

The certificate must contain, (1) the name of the corporation and if it was changed, its original name, (2) the date of filing of the certificate of incorporation with the secretary of state, (3) the law under which the corporation was formed, (4) that its existence is continued. Notice of this requirement is to be given to all membership corporations not later than March 1, 1951.

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1 L. 1950, c. 646.

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1 L. 1950, c. 588.

On October 15, 1951 the department of state is to compile a list of all membership corporations which have failed to file this certificate. All corporations on this list will then be declared dissolved and their charters forfeited. The secretary of state is to mail a copy of this list to each county clerk, for filing in the county records.

At any time after a membership corporation is so dissolved, it may file a certificate of annulment of dissolution and reinstatement. This certificate shall contain the same information as the report of existence, required under this statute, and state the corporation has failed to file that certificate and now elects to be reinstated. A five dollar filing fee is charged for filing this certificate.

Gifts, to a membership corporation, upon a contingency which occurs during the period of dissolution, are not destroyed, but the corporation must within one year after the contingency is fulfilled, file a certificate of annulment of dissolution and report of corporate existence. If the contingency occurs after the corporation is reinstated the gift shall take effect as if the dissolution had never occurred.

All membership corporation names are reserved for one year after the dissolution by proclamation. If the certificate of reinstatement is filed later than one year after such dissolution, the membership corporations will be required to choose a new name, if its old name conflicts with that of any other foreign or domestic corporation.

The purpose of this section is to clear the records of many old and nonfunctioning membership corporations.

NEGOTIABLE INSTRUMENTS LAW

Sections 350-b, 350-f Repealed; New Section 350-b Added; Section 350-j Amended[1]*—Provisions for bank collections.*

The new provisions inserted in Section 350-b, and the conforming changes in the other sections makes the law on payment of items by a drawee or paying bank conform more closely to existing banking practice.

Subdivision 1 of the new section provides the period within which a bank upon which an item is drawn, or at, through, or by which it is payable, other than in an over the counter transaction, may dishonor or return the item and revoke the credit. The periods are: (1) Demand instrument received for deposit —midnight of the following business day; (2) Demand instrument not for deposit but credited before midnight of the day of receipt—midnight of the next business day; (3) Other than demand instruments—midnight of the next business day; (4) All others—midnight of the day of receipt.

Subdivision 2 clarifies the law as to provisional credits subject to revocation, within the periods established under subdivision1, and provides the mechanics for revocation of a credit.

Subdivision 3 defines the terms "credit" and "irrevocable credit," as well as codifying the existing law that an item received after the close of a business day is deemed received at the opening of the next business day.

Conforming changes are made by repealing Section 350-f and adding appropriate language to Section 350-j subdivision 4.

The provisions of subdivision 1 of Section 350-b, by the express description of the periods within which an item can be dis-

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1 L. 1950, c. 153.

honored and a credit revoked, seem to imply that any item not returned within such time is irrevocably accepted. If such is the case, the new section clarifies the law on constructive acceptance which previously was not well established.[2]

PENAL LAW — CORRECTION LAW — MENTAL HYGIENE LAW — CODE OF CRIMINAL PROCEDURE

Penal Law Sections 3, 243, 483-a, 483-b, 510, 511, 690, 2010, 2184-a, 2186, 2188 Amended—Sections 1940, 1944-a, 2189-a Added—Correction Law Sections 148, 149, 211, 212, 214, 219, 220, 230-2 Amended—Mental Hygiene Law Section 11a Added —Code of Criminal Procedure Sections 660, 662-a Amended[1]— Indeterminate prison sentences[2] and psychiatric treatment for sex offenders.

The series of amendments to these statutes in addition to providing indeterminate prison sentences for certain sex offenders also has strictly limited the availability of parole, suspension of sentences, probation, and time off for good behavior for such offenders, as well as authorizing increased psychiatric facilities for treatment and rehabilitation of such persons.

The crimes for which an indeterminate sentence can now be imposed are: assault in the second degree with intent to commit rape, Penal Law Section 243; carnal abuse of a child, Penal Law Sections 483-a, and 483-b; crimes against nature, Penal

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2 The statute as amended is similar although not identical to provisions found in the new Uniform Commercial Code, which is presently being formulated.

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1 L. 1950 c. 525.

2 Indeterminate prison sentences as referred to herein are those having a minimum of one day and a maximum of natural life as provided by Penal Law Section 3 subdivision 10, and are not to be confused with the term as used in Penal Law Section 2189 as applied to habitual felons.

Law Section 690;[3] and rape in the first or second[4] degree, Penal Law Section 2010.[5] In addition, Sections 1940, and 1944-a have been added, authorizing punishment by an indeterminate prison sentence for persons convicted of *any* felony who have previously been convicted of one of the above offenses in New York or any other state or country, and making similar provisions for the crime of sexual abuse while committing a felony.

The indeterminate term by which these crimes are punishable is defined by subdivision 10, which has been added to Penal Law Section 3. It provides: "The terms 'life imprisonment' or 'imprisonment for life' shall not include imprisonment for an indeterminate term having a minimum of one day and a maximum of natural life;" but although a distinction between life imprisonment and imprisonment for an indeterminate term must be recognized, it is apparent that under the amended statutes, some of the same consequences attach to both sentences. Thus, one who is sentenced to an indeterminate term is civilly dead under Penal Law Section 511 as amended the same as a life prisoner.[6] Furthermore, one sentence to an indeterminate term suffers forfeiture of any public office, and all civil rights under the amended version of Penal Law Section 510, as does a life prisoner. In addition, a male between the ages of sixteen and nineteen sentenced to an indeterminate term cannot be sent to the state vocational insti-

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3 The amendment to Section 690 also provides for the crime of sodomy in the second degree. No provision for this crime was ever before made in our statutes, and it arises in cases where the defendant is over twenty-one years of age, the victim under eighteen, and the circumstancs such as do not amount to sodomy in the first degree. It is punishable by ten years imprisonment. In addition, all other cases of sodomy are made a misdemeanor.

4 An important change has been made in the definition of rape in the second degree by the amendment to Section 2010, and it can now be committed only by a person twenty-one years old or over, whereas under the former provisions, no age limit was provided. In addition, the amendment for the first time makes provision for all other cases not amounting to rape in the first or second degree to be a misdemeanor.

5 The former punishments for these crimes by definite prison sentences have been left in the statute, and presumably the sentencing judge can sentence the defendant to the indeterminate term or the definite term at his discretion, except as limited by the requirements for psychiatric examination covered by the new amendments.

tution under Penal Law Section 2184-a as amended, which is similar to the provision for life prisoners. Another similarity is to be found in Penal Law Section 218,[6] which now forbids sentencing of minors who are convicted of a crime punishable by an indeterminate term to the county rather than the state penitentiary, which is similar to the provision for persons convicted of crimes punishable by death or life imprisonment.

The effect of the indeterminate sentence is not in all cases similar to that of the life sentence, and the dissimilarities point up the stress put on the psychological aspects of these offenses, and the desire to rehabilitate those persons susceptible to cure, while detaining those who will be habitual offenders. The judge with authority to sentence a person convicted of a crime punishable by death or life imprisonment can not suspend sentence, or execution of judgment, nor can he place the defendant on probation. In the case of a person convicted of a crime punishable by sentence for an indeterminate term however, sentence can be suspended or the person placed on probation; but not until a psychiatric examination is made and a complete written report submitted to the judge in accordance with Penal Law Section 2188 as amended. It is further provided by the addition of Section 2189-a to the Penal Law that sentence shall not be imposed on a person convicted of a crime punishable by an indeterminate sentence until a similar psychiatric examination of the defendant has been conducted, and a written report submitted to the court. The psychiatric examinations provided for by these sections are to be conducted according to the requirements of the Code of Criminal Procedure and minor conforming amendments are made to Sections 660, and 662-e thereof.

Extensive provisions are made for the psychiatric study and treatment of persons sentenced to indeterminate terms. Section 11-a is added to the Mental Hygiene Law and requires the department of mental hygiene to supply appropriate psychiatric

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6 See also amendment to Penal Law Section 511 made by L. 1950 c. 144 enabling a person sentenced to life imprisonment to marry as is noted in this issue.

and psychological services to the department of correction and the division of parole, including the psychiatric study, diagnosis, and treatment of prisoners and parolees. This amendment further provides for the assignment of trained personnel to operate psychiatric clinics, and to establish training courses, and conduct research at the psychiatric institute, or other appropriate institutions in the state. Section 148 of the Correction Law as amended, authorizes the commissioner of correction to establish such clinics, and Section 149 now provides that the clinics shall study, and treat the physical and mental condition of all prisoners sentenced to indeterminate terms as well as such others as are in need of such treatment. A minor change in Section 211 of the Correction Law provides for additional information on prisoners to be sent to the board of parole, and Section 212 of the Correction Law concerning prisoners subject to parole is amended by the addition of a provision to the effect that prisoners serving an indeterminate term can be paroled without serving one year. Correction Law Section 214 provides for methods of release, and an amendment of subsection 3, calls for periodic reviews of the complete record of prisoners sentenced to indeterminate terms. Under Section 219 of the Correction Law, a person convicted of a felony while on parole from a sentence imposed for the conviction of a prior felony, was required to serve the remaining portion of the original sentence in addition to the new sentence for the felony committed while on parole. The new amendment to this section excepts prisoners sentenced to an indeterminate term from the operation of this provision. Section 220 of the Correction Law concerns the discharge of prisoners from parole, and subdivision 3 is added, providing that a person sentenced to an indeterminate term can be conditionally or absolutely discharged from parole by the board of parole; but an amendment to Subdivision 2 of Section 230 of the Correction Law forbids the paroling of prisoners under such sentence for good behavior.

These amendments have a cumulative effect of making a much heavier sentence available against sex offenders, and it is hoped that they shall have the effect of preventing the commission of such crimes particularly by persons who have previously been apprehended on such a charge.

The most important question regarding these amendments from a legal aspect seems to be that of constitutionality, as it is obvious that they leave the determination of the length of prison sentence with the parole board rather than the courts to a much greater extent than has ever been done in the past. Section 2189 of the Penal Law providing for indeterminate prison terms for second, third, and fourth offenders for commission of felonies is somewhat analogous and has been held to be constitutional in *People v. Adams* 176 NY 351, 68 N.E. 636 (1903), Aff'd 192 U.S. 585. But it will be noted that a distinction of considerable importance exists between the two types of indeterminate sentences in that the one provided for by Section 2189 has a maximum limit of the longest period for which the crime for which the offender is convicted is punishable, whereas the maximum period in the case of sex offenders is the remainder of the natural life.

The amendments to the statutes took effect April first, nineteen hundred fifty, and it will probably be some time before any authoritative decision of the constitutionality of the indeterminate term is made; but it is possible that the courts will reason that since it was within the power of the legislature to authorize a life sentence for these crimes originally, the amendments are constitutional, and the wide discretion given the board of parole empowers them to shorten the term as they are presently allowed to do.

Section 1290-a Amended[1]*—Larceny, pleading and proof.*

The present amendment makes it necessary to allege any false and fraudulent representation or pretense used by the defendant in the course of accomplishing, or in aid of, or in facilitating, the theft, in order to make proof thereof admissible in evidence. In addition, the amendment expressly provides that it is now immaterial what the theft was denominated at common law.

This changes the existing law on the subject as established by *People v. Lobel,* 298 N.Y. 243, 82 N.E. 2d 145 (1948) which re-

1 L. 1950, c. 149.

tained the old distinction between a larceny "effected" by false pretenses where the owner voluntarily parted with the property, and one where the property was taken without consent although false representations were used. The amendment is intended to further clarify the law of larceny which was attempted by the rewriting of Section 1290 and the addition of Section 1290-a in 1942.

Section 1751, Amended[1]*—Violations as felonies of public health law with respect to narcotic drugs.*

Three new subdivisions have been added to section 1751 of the penal law.

Previous to these additions, this section had defined as a felony the peddling, selling, bartering, or exchanging of any narcotic drug. This felony is punishable by imprisonment not exceeding ten years.

Subdivision two provides that anyone possessing narcotics with the intent to peddle, sell, barter, or exchange them shall be guilty of a felony punishable by imprisonment not exceeding ten years.

Subdivision three makes possession of two ounces or more of the narcotics, presumptive evidence of the intent to peddle, sell, barter, or exchange them.

Subdivision four states that the presumption arising by possession of the drugs as set forth in subdivision three is rebuttable.

These three subdivisions would seem to remove the necessity of proving the actual sale of the narcotics, as was previously required. The mere possession of the specified narcotics, under the new sections, will give rise to rebuttable presumption that they are possessed with the intent to sell them illegally.

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1 L. 1950, c. 346.

PERSONAL PROPERTY LAW

Section 21, subdivision 1 repealed, subdivision 7 amended, new subdivision 1 added.[1] *Conforming amendments to Section 85, Domestic Relations Law, and subdivision 3 of Section 100-c of the Banking Law—Investment of Trust Funds.*

Subdivision 1 of section 21 of the Personal Property Law has been repealed and a new subdivision 1 substituted. This new subdivision widens the class of legal investments open to a fiduciary and sets out the permissible investments in greater detail The change permits investment in securities of any corporation organized under the laws of the United States, District of Columbia, or of any state subject to certain limitations set forth in the new subdivision. It is interesting to note that investment in obligations of the Dominion of Canada, its provinces, and cities of over 150,000 population is now permitted, providing the obligations are payable in United States funds.

Subdivision 7 was amended to provide that as used in this section, the terms "person holding trust funds" and the terms "fiduciary" and "trustee" shall include an executor, administrator, trustee, guardian and committe of the property of an incompetent person.

Section 85 of the Domestic Relations Law is amended to provide that a guardian holding funds in trust for investment shall have the powers provided in Section 21 of the Personal Property Law.

Subdivision 3 of Section 100-c of the Banking Law is amended to provide that a trust company maintaining a legal common trust fund shall invest the same in the manner in which fiduciaries are authorized to invest by Section 21 of the Personal Property Law.

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1 L. 1950, c. 464.

STOCK CORPORATION LAW

Section 21 amended[1]*—Determination of value of stock of objecting stockholder.*

This section, which provides for the determination of the value of the stock of a dissenting stockholder who has demanded payment for his stock as provided for in sections 14, 20, 85(7), 87, 91, and 38(11) of the Stock Corporation Law, has been amended to set out in greater detail the procedure in obtaining appraisal of the stock in order to pay the demanding stockholder. The amendment provides for an offer by the corporation for the stock, accompanied by a recent financial statement, and an acceptance by the stockholder avoids any formal appraisal. Under the amendment, when an application for determination of value of the stock is made to the court, the court may proceed at once to determine the value, instead of appointing appraisers and receiving their report first, as was required under the old law.

Another new feature of the section provides for the assessment of the expenses of the action against any or all of the stockholders involved, if the court finds that the action of the stockholders in refusing the offer of the corporation was arbitrary and vexatious or not in good faith, a subject which was entirely omitted in the former section 21. Such expenses shall include fees of experts if the court find the retaining of such experts to have been reasonably necessary, if the value of the stock materially exceeds the offer, or if no offer was made by the corporation. In these cases the expenses will be assessed against the corporation. The new portions of the section also define the powers and duties of the appraisers to a greater extent.

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1 L. 1950, c. 647.

SURROGATE'S COURT ACT

Section 58, amended,[1] *Service of citation and other process.*

Section 58 of the Surrogate's Court Act, in relation to service of process by publication, has been amended.

The section in the past, had required publication of the citation in two or more newspapers, if the entire amount of the estate exceeded five thousand dollars.

The new amendment, which was recommended by the Executive Committee of the Surrogate's Association of the State of New York, makes the aggregate value of the interests of all persons to be served by publication the determining factor. If the interests of these persons be less than five thousand dollars, publication of citation in one newspaper is sufficient; if the interests of those served by publication exceeds five thousand dollars, publication in two newspapers is required.

Section 66, amended,[1]*—Surrogates may refer questions of fact.*

Section 66 of the Surrogate's court act, relating to reference by the surrogates of issues of law and fact to an official referee, has been amended.

In the past, the report or determination of the referee and a transcript of the testimony taken, had to be filed in the office of the surrogate in all cases.

The new amendment requires the filing of the transcript of testimony only in those cases where the referee was to hear and report the evidence. In a reference to hear and determine only the report of the referee must be filed and the transcript of testimony does not have to be filed.

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1 L. 1950, c. 42.

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1 L. 1950, c. 5.

This amendment was adopted upon the recommendation of the Executive Committee of the Surrogates' Association of the State of New York. The purpose of the change is to eliminate useless expense to the estate in filing transcripts of testimony, since after a reference to report and determine no confirmation of the referee's report is necessary.

Section 309 Amended[1]*—Power of Appellate Court.*

The amendment gives discretion to the appellate court upon reversing a decree in a contested probate proceeding to order a retrial of only those issues in respect to which error was found.

Prior to this change the appellate court was forced to grant a new trial of all issues even though its finding of error affected only one of them.[2]

TAX LAW

Section 292-a added; Former Section 292-a now Section 292-b[1] *—Proceedings to review tax assessments.*

The petitioner may now, for the purposes of the proceeding, serve a demand for an admission by the respondent that the ratio that the assessed valuation of the real property in the tax district bears to its full value is the ratio in the petitioner's demand. Petitioner may make this demand any time after an answer has been served, or deemed made, but not later than ten days before trial.

Unless respondent files a notice within twenty days specifically denying the ratio, it is deemed admitted.

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1 L. 1950 c. 488.

2 Matter of Lawler 257 App. Div. 1098. Matter of Gallo 252 App. Div. 861. Matter of Fogarty 275 App.. Div. 1057.

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1 L. 1950 c. 655.

If respondent does deny and the petitioner thereafter proves that the real ratio is not in excess of that which he claimed, the respondent will be liable for the reasonable expenses petitioner incurred in making the proof.

Respondent can be responsible for these expenses regardless of the outcome of the proceeding unless the court finds that he had good reason for the denial.

Section 353, subdivision 1 amended[1] *— Personal Income Tax Ascertainment of Gain or Loss.*

A clause was added to this section which provides that in the case of the sale of real property owned and occupied by the taxpayer as a residence, the basis for determining gain or loss shall be the actual cost plus the cost of any permanent improvements, with no charge for depreciation against the property or the cost of the improvements during the time of ownership and occupation as a residence by the taxpayer. The effect of this is to abolish the prior practice of taking the depreciated value in determining the gain of loss for tax purposes in the sale or disposition of this type of property. With this amendment, the rule in New York as to computation of gain or loss on this type of property is made to conform to the existing practice under the federal Internal Revenue Code.

Section 249-r, amended new paragraph 3 added[1]*—Taxable Transfers by Non-residents.*

The old paragraph 3 of section 249-r has been reworded and has an addition to the effect that any transfers of property made after October 8, 1949, and to take effect after his death shall not be included in the gross estate of the decedent unless he has reserved, by the express terms of the instrumnt of transfer, a reversionary interest in the property. This brings the New York

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1 L. 1950, c. 500.

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1 L. 1950, c. 683.

statute in conformity with the federal Internal Revenue Code, section 811.

Although the new paragraph 3 still says that transfers intended to take effect in possession or enjoyment at or after the transferor's death shall not remove the property from the gross estate of the decedent, this applies after October 7, 1949, only in certain cases defined in the new portion of this section.

Section 1513 Civil Practice Act—Amended; Section 294 Tax Law Amended[1]*—Costs; Additional Allowances.*

An allowance of up to five hundred dollars to a petitioner is now possible in a proceeding to review a tax assessment. If an assessment is reduced more than half the reduction claimed and if the court finds that the assessment was raised after a final order, administrative determination, or stipulation between the parties, without cause or in a grossly discriminatory manner, it may award the additional allowance. Formerly costs and disbursements were all that could be awarded.

This change is caused by the broadening of the tax law pertaining to additional allowances in difficult cases, to include proceedings to review tax assessments under Article 13 of the Tax Law. Reference is made to Section 294 of the Tax Law for the amount of such allowance.

This necessitated the amendment of that section to provide for the allowance of up to five hundred dollars if the court found the above mentioned conditions. A seven hundred fiifty dollar award is possible if two or more proceedings are consolidated and the same conditions are present.

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1 L. 1950 c. 654.

Recent Books

MEN AND MEASURES IN THE LAW. By Arthur T. Vanderbilt. New York: Alfred A. Knopf, 1949. Pp. xii, 156.

Popular dissatisfaction with the failure of a government of laws to advance with social, economic, and political conditions has at least three possible effects. There may result a reformed goverment of laws, or a government of men, or no government at all. Democratic tradition looks to the first possibility. The more complex the system, the more difficult the task of assuaging dissatisfaction. The greater the crisis, the more insistent the demand for reform.

Chief Justice Vanderbilt of the Supreme Court of New Jersey characterizes the current scene as one of extreme crisis confronting a system of unrivaled complexity. By men and measures has the law met crises historically; with frequent reference to those past achievements, Justice Vanderbilt shows the same remedy is required today.

Men must be produced who can correct these deficiencies of the legal order which the author so incisively reveals. The organization and administration of courts, the selection of judges and juries, pre-trial proceedings, and many other matters demand continual attention from skilled lawyers of broad education. Justice Vanderbilt makes provoking suggestions as to the content of pre-law and law school curricula necessary to produce men who are aware of their professional responsibilities and capable of fulfilling them. When such men are available, the justice says, the problems must be presented to them. To this end he vigorously cites the need for meeting-places where lawyers, judges, teachers, and others may confer and unite their talents and experience. He proposes the law schools.

Throughout the book, Justice Vanderbilt emphasizes that education and reform rely heavily on research. Accordingly, he examines the accessibility of the legislative, administrative, and decisional law of the federal government and the states, and tells how that accessibility may be increased.

NEW YORK CONSOLIDATED LAWS SERVICE. Twelve volumes. Volume 1. Abandoned Property To Civil Rights. Edited by J. Vincent Demsey. Rochester: Lawyers Cooperative Publishing Company. New York: Baker, Voorhis & Co., 1950.

The first of twelve volumes of the new *Consolidated Laws Service* (hereafter designated CLS) has been received. The publishers have adopted the filing-cover device, with each chapter contained in an individual removable pamphlet. The service will be kept up-to-date by cumulative annual supplements and, as time requires, by replacement pamphlets. The device avoids the expense entailed in replacement of entire bound volumes.

In its presentation of material, CLS has several distinctive features. The text of each statute appears in full without interruption on the upper portion of the page while the editorial matter is presented below in orderly arrangement. The reader is referred to general treatises and annotations in *American Law Reports* as well as to cases, revision commission notes, and other pertinent statutes. The case notes have been edited so as to omit decisions no longer of value. Where the case notes following any section are extensive, classified divisions are employed to permit more rapid discovery of the point sought. In addition to the descriptive word indices preceding the case notes, there appears at the back of each pamphlet a general word index which correlates all the subject-matter of the Consolidated Laws, the Unconsolidated Laws, and the New York Constitution applicable to the chapter indexed.

The editors have included in CLS another innovation worthy of note. Legal forms, the majority of them from litigated cases, are incorporated in the editorial matter in connection with the statutes.

The twelve volumes will contain, when completed, the Consolidated Laws, the Constitution, and a table of histories of laws amended, repealed, or renumbered.

H. R. H.

THE LAW OF ARREST IN CRIMINAL AND OTHER PROCEEDINGS. Two volumes. By Clarence Alexander. Buffalo, New York: Dennis & Co., Inc., 1949. Pp. xciii, 2260.

In two volumes, the author has covered the complexities of the law of arrest. The work is a very detailed account of nearly any conceivable situation that could arise in this subject both as to criminal as well as to civil proceedings.

Primarily, the author has divided his work into five parts on criminal proceedings, courts and procedure therein, civil liabilities, crimes and punishment, and noncriminal proceedings. Necessarily, each part is of considerable length. The part on criminal proceedings sets out the certain basic guarantees of rights and privileges under the Constitution, treaties and laws. Part II, on courts and procedure deals in great detail with the procedural phases of this law. Defenses, witnesses, evidence, bail, new trials and appeals are only a few of the many topics covered. The civil liabilities section tells who may be subject to liability. The courses of action and defenses used to impose or avoid liability are then discussed. Part IV on crimes and punishment describes the various elements and degrees of crime, parties to crimes and punishment. Finally, the section on noncriminal proceedings deals with such matters as aliens, insane persons, material witnesses, civil contempt, debtors, and administrative bodies.

This work, it seems, should be of value as a reference in all jurisdictions. Although the many case citations are principally of New York and Federal cases, many other jurisdictions are included. Very recent cases abound in the footnotes. A complete index and the table of contents makes search for the material needed very rapid and effective.

MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION. Edited by Arthur T. Vanderbilt. Newark, New Jersey: National Conference of Judicial Councils, 1949. Pp. xxxii, 752.

This book presents a compilation of reports made to the Judicial Administrative Section of the American Bar Association concerning the adoption of the Association's recommendations for minimum and practical standards of court procedure and administration. The paucity of adoptions makes this work particularly timely and points up the need for full consideration of the recommended standards.

The significance of this compilation can be properly understood and appreciated only if the recommendations previously made and adopted by the American Bar Association are kept in mind. A recommendation dealing with judicial selection, conduct and tenure was adopted in 1937. Its principal objective was to have vacancies in judiciary offices filled by appointment from a list of qualified candidates; the list was to be submitted by an agency composed in part of high judicial officers and in part of selected citizens who held no other public office and appointment was to be made by an elective official, usually the chief executive. Provisions for confirmation by a legislative body as well as recall by the electors were also suggested. This recommendation was designed to meet the criticism continuously directed at selection of judicial officers by popular vote or other partisan methods. The editor states that only nine jurisdictions utilize the system advocated.

In 1938, the American Bar Association adopted many other recommendations thought to be essential. Chapter two of this volume discussed the recommendations for a unified judicial system in each state, with the power and responsibility in one of the judges to assign judges to judicial service and relieve docket congestion. Further, it was recommended that Judicial Councils be strengthened, with representation accorded the Bar and the Judiciary Committees of the legislatures and that adequate judicial statistics be kept. These recommendations have been adopted, with qualification, in only a few states.

It was also proposed that practice and procedure be regulated by rules of court; and to this end the courts should be given full rule making power. Aimed at the intermittent and piecemeal legislative action in this line, the proposed system would pro-

vide simpler, faster and more flexible procedure from the beginning to the end of a given action. The editor points out that this has been done successfully in federal courts. Similar in purpose was the recommendation that pretrial conferences and examinations before a judge be used to simplify issues and expedite trials. It was pointed out that where provisions of this sort have been adopted, they have met with general approval. Rule 16 of the Federal Rules of Civil Procedure is expressly designated as the standard to be used.

Another recommendation, widely discussed, but with few adoptions, is that of selecting jurors by commissioners appointed by the court, with allowance for alternate jurors and examination of jurors in their *voir dire* as provided for in Rule 47 of the Federal Rules of Civil Procedure.

On the subject of trial practice, the recommendations set forth by the American Bar Association are designed to restore the judge to his former position of governor of the trial instead of permitting him to remain a mere moderator. This entails a requirement that the conduct of all persons during the trial be respectful and sincere, with the business at hand as the chief concern. After counsel have concluded their arguments to the jury, the judge would be permitted to instruct the jury orally on the law of the case, and to advise them on the facts by summarizing the evidence, including comment upon its weight and credibility. This, of course, is the practice followed in federal courts, and had been the practice at common law. Also recommended with regard to trial practice are rules relating to discovery, partial judgments, judgment *n. o. v.*, fact issues, and limits on preliminary injunctions. A number of these proposals have been adopted by many states, but the report shows that the power of a judge to summarize and comment on the evidence is unduly restricted in most jurisdictions. Critics have failed to point out any actual danger in these recommendations.

The present laws of evidence were studied and the recommendations were adopted dealing with: (1) limitation on the right to new trials on the ground of error in admission or exclusion of evidence where substantial error does not appear upon

examination of the entire record, there being no showing of a miscarriage of justice or a denial of substantial rights of parties; (2) removing the requirement of exceptions to admission or exclusion of evidence in order to review error on appeal; (3) broader allowances of testimony by interested parties as to transactions with deceased or insane persons; (4) limitation of privileged communication between patient and physician, but no privilege to accountants, social workers, and journalists; (5) Uniform Business Records as Evidence Act adoption; (6) admission into evidence of certified copies of official records; (7) admission of testimony of ordinary witnesses as to ordinary matters which they have observed and their conclusions with explanation; (8) greater freedom in calling and examining unwilling or hostile party; and (9) limitations on calling expert witnesses, with notice, and filing of their reports. All of these recommendations for changes in the rules of evidence have been set forth in a model code. Jurisdictions still differ widely in their own rules of evidence on these matters.

The states have apparently been slow to adopt the recommendations made for appellate practice. These sought to expedite appellate review, limit or avoid "one-man" decisions, limit taxable costs for printed briefs, extend use of oral argument, fix pecuniary limits before appeal can be taken as of right except upon a showing of an important question of law, and also to accomplish other relevant objectives.

Included in this report is the progress made in adopting the recommendations of the American Bar Association with regard to local traffic courts and justices of the peace courts. A chapter devoted to state administrative agencies and tribunals points up the problems that have arisen in connection with the selection of administrators and the scope of their authority, with the requirement of due process of law given consideration.

This work, it is supposed, will be given wide publicity both within and without the profession. For those who believe that their respective states should act to conform to the recommendations set forth, this volume provides access to basic information upon which such future action can be guided. Justice Vander-

bilt points out in the introduction that there has been small impetus given procedural reforms by the profession while, on the contrary, substantive law is under constant change. Attention is directed to the fact that the layman directs most of his criticism of the entire judicial system at defects in procedure, especially after he experiences some of the law's interminable delays or an adverse decision based on purely technical grounds. The editor presents a timely warning that if the judiciary and bar cannot accomplish desired reforms through its own action, judicial administration will inevitably be changed by other forces.

AN INTRODUCTION TO LEGAL REASONING. By Edward H. Levi. Chicago; University of Chicago Press, 1949. Pp. 74.

The author in this work seeks to explain, by discussion as well as by case illustration, the complex thought process of legal reasoning. The author's thesis is that the basic pattern of legal reasoning is reasoning by example, rather than reasoning from legal rules. The process seems to take place as follows: similarity is seen between cases; next, the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case. This process is essential to provide stability in the law while allowing the development of legal rules. The danger of a catastrophic overthrow of generally accepted legal principles is minimized as well. For example, the Constitution, rather than being an inflexible mandatory statute in the field of legal reasoning, allows interpretation of conflicting concepts of the community, as expressed in the Constitution, to be reflective of present day thought.

After this introduction, the author specifically illustrates his premises. The examples used trace the development of the "inherently dangerous" rule, the application of the Mann Act, the Child Labor and Fair Labor Standards Cases and many others. This development of case law, statutory law and constitutional law is shown to follow the process outlined. The author points out the inconsistencies in the application of legal reasoning by various courts and the methods by which each court rationalized what it obviously considered a correct and desirable result. It may be

added that the rationale offered for the Child Labor and Fair Labor Standards Cases provides a good history of the Supreme Court shift.

In conclusion, Mr. Levi gives an answer to those who believe that the law should develop only according to rules of logic. He states that legal reasoning has a logic of its own which allows both ambiguity and new social concepts to be given a meaning.

J. F. C.

ON UNDERSTANDING THE SUPREME COURT. By Paul A. Freund. Boston: Little, Brown and Company, 1949. Pp. vi, 130.

This volume consists of a series of Rosenthal Foundation Lectures given by the author, a Professor of Law at Harvard University, at the Northewestern University School of Law. The book addressees itself to relevant questions for an appreciation of the Supreme Court's tasks and decisions. To accomplish this task, the author has divided his text into three sections.

The first section explains the sharp cleavages in the court in the two major fields of decision: the field of civil liberties and the field of application of federal regulatory law. In connection with this, the author notes a new liberty based on property economics which has grown so as to embrace a new concept of property, this being the freedom of speech and assembly. This new liberty is shown in the transformation of economic pressures into rights of free expression, for example, picketing. However, the Supreme Court, in this regard, has left to public opinion the question of how important economic interest is to human freedom.

In the area of civil liberties, the author points out three distinct lines of conflict: first, aggressive and passive liberties; secondly, the clear-and-present danger test; and thirdly, the relevance of federalism in the vindication of civil liberty. In all these disputes, Professor Freund relates, there is a recurring pattern of conflict in the judge's problem, "How far is a court free to reconsider an earlier doubtful decision when the legislature has not acted to change the law?" In discussing the issue the author refutes the

theories which profess: that the functions of correcting prior erroneous decisions is for the legislature; that the courts should wholly disregard legislative inaction.

In the second section entitled "The Portrait of a Liberal Judge —Mr. Justice Brandeis," it is stated that in adjudging the legal rights of litigants the court must never anticipate a question of constitutional law nor formulate a rule of law broader than required by precise fact. As for the indicia of a "liberal" judge, the outstanding example is Justice Brandeis whose liberalism lay not in his votes against large corporations, but in his morality of mind as shown in (1) an insistence on knowledge as indispensable to judging; (2) rejection of opportunism; (3) insistence on jurisdictional and procedural observances; and (4) rejection of sentimentality. These characteristics appear in Brandeis' opinions, a vehicle for his social and economic ideas.

The last section, "Judge and Company," describes the many subtle ways in which a counsel has a crucial role in shaping constitutional law. The situation of the expert witness in constitutional litigation is also explained as well as the court's problems regarding the scoope to be given to statutes before it, because the fate of many statutes may turn on how the constitutional questions are presented by these parties.

The timing of constitutional litigation—whether a determination of constitutional issues be postponed or expedited in the light of public interest—is developed. The author's solution is that constitutional questions be envisaged as early as possible in litigation but not exclusive of other issues which may be determinative.

In conclusion, the author predicts that constitutional litigation over state laws will be gradually concentrated in state courts under state constitutional provisions, while in the federal field constitutional issues may be diverted to the legislative stage. Therefore, some day the constitutional lawyer may appear before Congressional committees more frequently than in court, making constitutional law one phase of legislative drafting.

G. R. L.

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